SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 608

LULU B. McGEE, PETITIONER

vs.

INTERNATIONAL LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, FIRST SUPREME JUDICIAL DISTRICT

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3 Caption omitted.

4 In the District Court of Harris County, Texas, 127th Judicial District

No. 418764

LULU B. McGEE

vs.

INTERNATIONAL LIFE INSURANCE COMPANY

Plaintiff's original petition filed April 9, 1953

To the Honorable Judge of said Court:

Comes now Lulu B. McGee, hereinafter styled Plaintiff, complaining of International Life Insurance Company, a corporation, hereinafter designated as Defendant, and for cause of action would respectfully show this Honorable Court as follows:

1

That the Defendant is a corporation, organized under and by virtue of law, with an home office and place of business in Austin, Travis County, Texas, to-wit: International Life Building, where service of process may be had.

2

That on October 11, 1951, in the Superior Court of the State of California, in and for the City and County of San Francisco, being then and there a Court of record, with jurisdiction in the premises, Plaintiff herein recovered of Defendant herein, by the judgment and consideration of said Court, a judgment by default after compliance with Sections 1610 to 1620, inclusive, of the Unauthorized Insurors Process Act, California Insurance Code, and after service of process had been complied with in said suit, as required by said code, said default judgment was entered in the sum of Five Thousand Dollars ($5,000.00), with interest thereon at the rate of seven percent (7%) per annum from the second day of March 1951, to the date of said judgment, to-wit: October 11, 1951, in the sum of Two Hundred

Fourteen and 79/100 Dollars ($214.79), together with Plaintiff's costs and disbursements in said suit in the sum of Fourteen Dollars ($14.00).

3

That no part of said judgment has been paid or otherwise satisfied; that said judgment remains in full force and effect and that there are no set-offs or counter-claims which would reduce the amount of the judgment; that said judgment is a final judgment.

4

Plaintiff attaches hereto duly authenticated copy of said judgment rendered in the aforesaid Court, being Case No. 408.051, recorded in Volume 901, page 331, on October 11, 1951, among the Public Records in and for the County of San Francisco, California.

Wherefore, Plaintiff prays that citation issue and be served upon the said Defendant in form and manner required by law, requiring the Defendant to appear and answer herein, and that upon final hearing hereof, Plaintiff have judgment against said Defendant in the total sum of Five Thousand Two Hundred Twenty-eight and 79/100 Dollars ($5,228.79), together with interest thereon from the date of the aforesaid judgment, all costs of Court, and all such other and further relief to which he may be entitled in the premises, including the right to have execution issued forthwith upon rendition of judgment.

MANDELL & WRIGHT,
By (S) FREDERICK S. GROSSBERG,
Attorneys for Plaintiff,
200 Republic Building, Houston 2, Texas.

DREYFUS, McTERNAN & LUBLINER,
57 Post Street, San Francisco,
Telephone: GArfield 1-8284,
Attorneys for Plaintiff.

6 *Exhibit to plaintiff's original petition*

In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 408051

LULU B. McGEE, PLAINTIFF

v.

INTERNATIONAL LIFE INSURANCE COMPANY, A CORPORATION, FIRST DOE, SECOND DOE, THIRD DOE, BLACK COMPANY, A CORPORATION, FOURTH DOE AND FIFTH DOE, INDIVIDUALS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DOE COMPANY, A PARTNERSHIP, AND ROE COMPANY, A NONINCORPORATED ASSOCIATION, DEFENDANTS

Judgment

Whereas, it appears and the Court so finds:

1. That a complaint in the above entitled action was filed in the office of the County Clerk of the City and County of San Francisco in the State of California, on the 18th day of June 1951, and that summons was issued on the same date.

2. That the defendant, International Life Insurance Company, is a corporation organized and existing under the laws of the State of Texas, and doing business in the City and County of San Francisco, and is a Non-Admitted Insurer within the meaning of the Unauthorized Insurers Process Act, California Insurance Code, Section 1610–1620.

3. That summons has been duly served on said defendant in the manner prescribed in Sections 1612, 1613, California Insurance Code, in that plaintiff caused two copies of the said complaint and summons to be delivered to and left with a person in apparent charge of the office of the Insurance Commissioner

7 of the State of California, 1182 Market Street, San Francisco, California, on the 18th day of June, 1951.

4. That notice of such service and a copy of the process were sent within ten days thereafter by registered mail by plaintiff's attorney to the defendant International Life Insurance Company, at its last known principal place of business.

and the receipt issued by the Post Office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter was addressed, and the affidavit of plaintiff's attorney showing a compliance with Sections 1612, 1613, California Insurance Code, were filed with the Clerk of this Court before the date defendant International Life Insurance Company was required to appear.

5. That the time within which the said defendant International Life Insurance Company was required to appear and plead herein has expired and it has not appeared herein and no answer or demurrer has been filed herein, and the default of said defendant has been duly and regularly entered.

6. That the Court has received evidence of the allegations of the complaint and has required the plaintiff to be examined, on oath, respecting any payments that have been made to the plaintiff or to anyone for his use, on account of any demand mentioned in the complaint.

Now, therefore, on application of the plaintiff,

It is hereby ordered, adjudged and decreed that the plaintiff recover of and from said defendant International Life Insurance Company the sum of five thousand dollars ($5,000), with interest thereon at the rate of seven per cent (7%) per annum from the 2nd day of March, 1951 to the date hereof in the sum of $214.79, in all amounting to $5214.79, together with plaintiff's costs and disbursements in the sum of $14.00.

Dated this 11th day of October, 1951.

8 (S) W. T. SWEIGERT,
Judge of the Superior Court.

Endorsed: Filed Oct. 11, 1951. Martin Mongan, Clerk. By J. Fitzpatrick, Deputy Clerk.

Recorded: Vol. 901, page 331, Oct. 11, 1951. Martin Mongan, Clerk. By R. D. Carroll, Deputy Clerk.

In the Superior Court of the State of California in and for the City and County of San Francisco

No. 408051

LULU B. McGEE, PLAINTIFF

v.

INTERNATIONAL LIFE INSURANCE COMPANY, A CORPORATION, ET AL., DEFENDANT

I, Martin Mongan, County Clerk of the City and County of San Francisco, and Ex-Officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify the foregoing to be full, true and correct copy of the original judgment on file and of record in my office in the above entitled cause. That the same constitutes a full and complete exemplification of the above matter in the said cause, and of the whole thereof.

All of which I have caused to be exemplified according to the Act of Congress.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 17th day of February, A. D. 1953.

[SEAL] (S) MARTIN MONGAN,
County Clerk and Ex-Officio Clerk of the Superior Court.

9 I, Preston Devine, Presiding Judge of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that said Court is a Court of Record having a Clerk and Seal. That Martin Mongan, who has signed the annexed attestation, is the duly appointed and qualified County Clerk of the City and County of San Francisco, and was at the time of signing said attestation, Ex-Officio Clerk of said Superior Court. That said signature is his genuine handwriting, and that all his official acts as such Clerk, are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 17th day of February, A. D. 1953.

(S) PRESTON DEVINE,
Presiding Judge of said Superior Court.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, Martin Mongan, County Clerk of the City and County of San Francisco, and Ex-Officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that the Honorable Preston Devine, whose name is subscribed to the preceding Certificate, is Presiding Judge of the Superior Court of the State of California, in and for the City and County of San Francisco, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 17th day of February A. D. 1953.

[SEAL] (S) MARTIN MONGAN,
County Clerk and Ex-Officio Clerk of the Superior Court.

[File endorsement omitted.]

In the District Court of Harris County, Texas, 127th Judicial District

No. F-418764

[Title omitted.]

Defendant's first amended original answer

Filed September 17, 1953

To the Honorable Judge of Said Court:

Comes now International Life Insurance Company, Defendant in the above entitled and numbered cause and filed this, its First Amended Original Answer, and for such answer, would respectfully show the court the following:

I

Defendant denies all and singular the allegations contained in Plaintiff's Original Petition, and of this it outs itself upon the country.

II

Defendant would show the court that it is not now nor has it ever been licensed to transact business of any kind whatsoever in the State of California, where plaintiff secured the judgment, which is the basis of this suit.

III

Defendant would further show the court that it does not now nor has it ever maintained an office in the State of California nor does it have or maintain agents in said State nor has it ever sought to do a general business of insurance in the State of California.

11

IV

Defendant would show the court that the policy of life insurance upon which plaintiff brought suit in the State of California was issued April 21, 1944, by the Empire Mutual Insurance Company, a company operating under the Laws of the State of Arizona, upon the life of Lowell Stepp Franklin; that said policy was solicited by the Empire Mutual Insurance Company by United States Mail; that the said Lowell Stepp Franklin applied for said policy by the United States Mail; that the application of said Lowell Stepp Franklin for said policy was accepted by the Company in Phoenix, Arizona; and that all negotiations leading up to the issuance of said policy by the Empire Mutual Insurance Company were conducted by correspondence with the said Lowell Stepp Franklin through the United States Mail.

V

Defendant would also show this honorable court that the above described policy was issued at Phoenix, Arizona, the domicile and place of business of the Empire Mutual Insurance Company; that the policy was delivered to the said Lowell Stepp Franklin through the United States Mail; that all premium due notices were mailed from the company's offices in Phoenix, Arizona; that all the payments of premiums on said policy were received by the company at its offices in Phoenix,

Arizona; that the said Empire Mutual Insurance Company at no time material hereto maintained either offices or agents or representatives of any kind whatsoever in the State of California.

VI

Defendant would further show the court that Empire Mutual Insurance Company and International Life Insurance Company, a Texas Corporation and Defendant herein, entered into an agreement effective September 1, 1948, by
12 which International Life Insurance Company assumed the liabilities of the policy hereinabove described, issued upon the life of Lowell Stepp Franklin; that the said International Life Insurance Company maintained no offices, agents, collectors, adjustors or representatives in the State of California; that the said International Life Insurance Company at no time has conducted any insurance business in the State of California.

VII

Defendant would show this honorable court that its sole activities with respect to the State of California have been to mail premium due notices from the State of Texas to the policyholders resident in the State of California, to accept at its offices in the State of Texas the premiums paid by such California residents, the payment of claims on policies covering the lives of such California residents, and the issuance to Lowell Stepp Franklin of the reinsurance agreement heretofore described in Paragraph VI, all of which activities were and are conducted exclusively by United States Mail and without the intervention of any agent or representative of any kind whatsoever located and operating in the State of California.

VIII

Defendant would show this court that it has never conducted an investigation of any claim through agents or representatives in the State of California nor has it ever appeared in or before any court of the State of California seeking relief or redress of any kind whatsoever.

IX

Defendant would further show that the policy of insurance issued upon the life of Lowell Stepp Franklin by the Empire Mutual Insurance Company which was later assumed by International Life Insurance Company expressly
13 provided as follows:

"This policy does not cover any injury, disability, loss of life or any other loss sustained by the insured, unless sustained in the United States of America, the Dominion of Canada, or Mexico (except on any steamship as provided in Part I, and except as provided under 'limitations' above, Paragraph 4), nor does it cover any loss caused or contributed to, directly, wholly or partly, by suicide or any attempt threat while sane or insane; or as a result of insanity or mental infirmity; or by injury intentionally inflicted upon the injured by himself while sane or insane, or while or as a result of committing a felony or assault; or from taking poison or inhaling gas (whether voluntary or involuntary); or while riding or driving in races; or testing an automobile on any tract or speedway; or while violating any criminal law, or while intoxicated under the influence of or affected by or resulting directly or indirectly from intoxicants or narcotics; or by venereal disease or its complications; or for any injury to or disease or ailment of the genito-urinary organs not common to both sexes; or from childbirth or pregnancy or any complication or result of either. No indemnity shall be payable for hernia in any form, whether incurred before or after the date of the policy, or for injuries fatal or non-fatal (except accidental drowning) for which there shall be no visible mark or contusion or wound on the exterior of the body at the place of the injury; or where internal injuries are not disclosed by an autopsy;" that the proofs of loss and death certificate furnished show that the said Lowell Stepp Franklin committed suicide while committing an assault on two officers of the law and while he was an inmate of a hospital of the mentally insane; that the coroner's jury verdict returned and based
14 upon uncontradicted evidence established the same facts as above set out; that upon these facts and in light of the exclusion of liability provision above set out International

Life Insurance Company denied liability under the policy and offered refund of premiums prior to the filing of the original suit in the State of California.

X

Defendant would further show the court that neither Empire Mutual Insurance Company nor International Life Insurance Company ever applied for a permit to do the business of insurance in the State of California; that neither Empire Mutual Insurance Company nor International Life Insurance Company has ever appointed or authorized John R. Maloney, Insurance Commissioner of the State of California, or any of his successors or any of his deputy commissioners, or the Department of Insurance of the State of California, or any other person, agent, representative or employee of such Department of Insurance of the State of California, or any other person, officer, agent, representative or employee of any other department or agency or commission of the State of California to accept or represent for and on behalf of Empire Mutual Insurance Company or International Life Insurance Company, service of process, summons, complaint, or any other notice in the suit filed on the policy and claim of Lowell Stepp Franklin entitled Lula B. McGee vs. International Life Insurance Company, Cause No. 408051, in the Superior Court of the State of California, in and for the City and County of San Francisco, or in any other suit or proceeding.

XI

Defendant contends and would show this honorable court that plaintiff herein attempted to secure service of citation upon defendant herein and thereby confer jurisdiction over said defendant in the Superior Court of the City and County of San Francisco, State of California; by depositing with the Department of Insurance of the State of California copies of the Summons and Complaint filed in the cause heretofore described in Paragraph VIII hereof, whereas in fact, and as a matter of law, defendant International Life Insurance Company was not doing business in the State of California; that such service was ineffectual for all purposes

and could not serve to confer jurisdiction of defendant herein in the California Court.

XII

Defendant would further show the court that Sections 1610 and 1611 of the Unauthorized Insurers Process Act, California Insurance Code, under which Act plaintiff purported to acquire service of citation upon and jurisdiction of the defendant in the original suit is on its face and as applied to this defendant unconstitutional and void in that it deprives defendant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

XIII

Defendant contends and would further show the court that Sections 1610 and 1611 of the Unauthorized Insurers Process Act, California Insurance Code, under which Act plaintiff purported to acquire service of citation upon and jurisdiction of the defendant in the original suit, is unconstitutional and void as applied to this defendant in that it places unreasonable and unwarranted restraints and bonds upon interstate commerce in violation of Article I, Section 8, Paragraph 3, of the Constitution of the United States of America.

XIV

Defendant contends and would further show the court that Sections 1610 and 1611 of the Unauthorized Insurers
16 Process Act, California Insurance Code, under which Act plaintiff purported to acquire service of citation upon and jurisdiction of the defendant in the original suit, is unconstitutional, void and discriminatory as applied to this defendant in that it deprives defendant of equal protection of the laws in violation of Section I of the fourteenth amendment to the Constitution of the United States.

XV

Defendant contends and would further show the court that Sections 1610 and 1611 of the Unauthorized Insurers Process Act, California Insurance Code, under which Act plaintiff pur-

ported to acquire service of citation upon and jurisdiction of the defendant in the original suit, is unconstitutional and void as to this defendant in that it impairs the obligation of contract in violation of Article I, Section 10, of the Constitution of the United States.

XVI

Defendant would show the court that for the reasons set forth in Paragraphs XII, XIII, XIV, and XV hereof that such Act is void and of no force as applied to this defendant; that service of citation under and by virtue of such Act upon Defendant is of no legal force, effect or significance, that the judgment rendered against this defendant by the California Court is void and of no effect inasmuch as the California Court had not acquired, by virtue of such service, personal jurisdiction of the defendant International Life Insurance Company.

Wherefore, premises considered, defendant prays that this honorable court find that Sections 1610 and 1611 of the Unauthorized Insurers Process Act of the California Insurance Code is unconstitutional and void in its application to this defendant; that the Superior Court of the City and
17 County of San Francisco, State of California, did not have personal jurisdiction of defendant in the suit entitled Lula B. McGee v. International Life Insurance Company, Cause No. 408051, filed in said court; that this honorable court find that defendant was not and is not doing business within the State of California; that this honorable court find that service upon the Insurance Commissioner of the Department of Insurance of the State of California, or his agents, or deputies, is insufficient to confer jurisdiction of this defendant in the courts of the State of California; that plaintiff take nothing by her suit, and that as to plaintiff's suit, defendant go hence with its costs without day, and for general relief.

YANCY, STERRETT & MILLER,
Attorneys for Defendant.
SAM L. STERRETT, Jr.,
1831 Melrose Building, Houston, Texas, CHarter 2340.

[File endorsement omitted.]

No. F418764

In the District Court, Harris County, Texas, 151st Judicial District

LULU B. McGEE

v.

INTERNATIONAL LIFE INSURANCE COMPANY

Judgment

July 5, 1955

This the 5th day of July, 1955, came on to be heard the above entitled and numbered Cause; and came the Plaintiff, Lulu B. McGee, by her attorney of record and announced ready for trial and came the Defendant, International
18 Life Insurance Company, by its attorney of record and announced ready for trial, and a jury having been waived by both Plaintiff and Defendant, trial was had before the Court; said Cause was submitted to the Court upon the pleadings of the parties and upon an agreed stipulation of facts executed by attorneys of record for Plaintiff and Defendant, which agreement and stipulation is on file among the papers of the Cause; and Defendant offered in evidence, in addition to the stipulation above referred to, the Proof of Loss furnished Defendant by Plaintiff, which Proof of Loss was comprised of various instruments including Claimant's Statement, Certificate of Death, Coroner's Verdict and Transcript of Testimony before Coroner's Court, to which offer of evidence Plaintiff excepted and objected and the Court sustained Plaintiff's objection to which action Defendant duly excepted; after which the Court heard argument of counsel regarding said cause from attorneys for both Plaintiff and Defendant; and the Court, after hearing and considering the pleadings of the parties herein, the evidence, stipulation of facts, and the argument of counsel in regard thereto, is of the opinion and finds as a matter of fact that the Defendant,

International Life Insurance Company, is not now, nor has it ever done business in the State of California, that it has maintained no agents nor offices and does not now maintain agents or offices in the State of California for any purpose whatsoever, that the policy made the basis of Plaintiff's suit in California against Defendant was issued by mail by Empire Mutual Insurance Company from its home office in the State of Arizona on April 21, 1944, to a resident of the State of California; that said policy was reinsured by Defendant on September 1, 1948; that a copy of said reinsurance agreement was sent by Defendant by mail from its home office in the State of Texas to Insured Lowell Stepp Franklin, to
19 which action the Insured Lowell Stepp Franklin, agreed and assented; that the statute under which service was had upon Defendant in the State of California known and referred to as the California Unauthorized Insurors Process Act was passed and became effective on October 1, 1949; that the said Lowell Stepp Franklin died December 11, 1950; that the only activity of the said International Life Insurance Company in the State of California in connection with said policy after the effective date of said Unauthorized Insurors Process Act was to mail to the Insured quarterly premium due notices, to receive from said Insured by mail those premiums as paid, to receipt for said premiums by mail and to deny by mail after due consideration the claim by Plaintiff under said policy.

The Court further finds and is of the opinion that in view of such facts the attempt by the Plaintiff to apply the California Unauthorized Insurors Process Act for purposes of securing jurisdiction of the Defendant in the State of California was an unconstitutional application of said Act in that it deprived Defendant of due process of law as guaranteed to him by Section I of the XIVth Amendment to the Constitution of the United States; that the Superior Court of the State of California in and for the City and County of San Francisco in Cause No. 408,051, entitled Lulu B. McGee v. International Life Insurance Company had no jurisdiction over the Defendant for the purpose of rendering a personal judgment against said Defendant, and that the said California judgment and

action made the basis of this suit, same being the judgment of the Court rendered in that Cause just above described was therefore void ab initio.

Now, therefore, it is ordered, adjudged and decreed that Plaintiff take nothing by her suit and costs of this proceeding are hereby adjudged against Plaintiff for which let execution issue, to which action of the Court Plaintiff duly excepted and gave notice of appeal.

Signed this 11th day of July, 1955.

(S) W. SEARS McGEE,
Judge, 127th Judicial District,
Harris County, Texas.

Approved as to form:

(S) H. WRIGHT,
MANDELL & WRIGHT,
Attorneys for Plaintiff.

(S) SAM L. STERRETT, Jr.,
YANCY, STERRETT & MILLER,
Attorneys for Defendant.

In the District Court of Harris County, Texas, 127th Judicial District

No. F–418,764

[Title omitted.]

Stipulations

Filed October 6, 1954

To the Honorable Judge of Said Court:

Comes now, Lulu B. McGee, Plaintiff, by and through her attorneys of record, Messrs. Mandell & Wright, and International Life Insurance Company, by and through it attorneys, Messrs. Yancy, Sterrett & Miller, and by agreement make these following Stipulations as to facts of this case, on which Stipulations, in addition to any direct testimony, depositions, documentary evidence, or exhibits which may be offered by either Plaintiff or Defendant in said cause, this Honorable Court is requested to render its decision:

21 I

That on April 21, 1944, the Empire Mutual Insurance Company, a benefit company, organized and existing under the laws of the State of Arizona, issued to Lowell Stepp Franklin a policy of insurance numbered 115281, a photostatic copy of which is attached hereto as Exhibit A, insuring the life of said Lowell Stepp Franklin, in the amount of $5,000.00.

II

That said policy of insurance, by its terms, was made in the State of Arizona, and such policy was signed by the President of Empire Mutual Insurance Company at the home office of said company in Phoenix, Arizona, and the original of said policy was mailed to the assured Lowell Stepp Franklin from such office.

III

That Lowell Stepp Franklin made timely payment of premiums up to and including the date of September 1, 1948.

IV

That with the approval of the Corporation Commissioner of the State of Arizona and the Board of Insurance Commissioners of the State of Texas, International Life Insurance Company, a corporation organized and existing under the laws of the State of Texas, and the Empire Mutual Insurance Company of Arizona entered into an agreement on or about September 1, 1948, whereby International Life Insurance Company agreed to offer to each legal holder a valid outstanding policy of Empire Mutual Insurance Company, including Lowell Stepp Franklin, a reinsurance certificate reinsuring and assuming the liability of Empire Mutual Insurance Company under such policy subject to the terms and conditions of such reinsurance agreement.

22 V

That after September 1, 1948, pursuant to its agreement with the Empire Mutual Insurance Company, International Life Insurance Company caused to be mailed from the home

office of said company in Austin, Texas, to Lowell Stepp Franklin a reinsurance certificate, a photostatic copy of which is attached hereto as Exhibit B, which certificate by its terms offered to insure Lowell Stepp Franklin in accordance with his agreement with the Empire Mutual Insurance Company with certain exceptions and changes in the terms of his policy, which exceptions and which changes are set out in such exhibit. The said Lowell Stepp Franklin, a citizen and resident of California, did receive and accept in California the reinsurance certificate as furnished him by International Life Insurance Company as manifested by his retentions of said certificate and his continued payment of premiums on said policy as altered by such certificate in accordance with the terms of such certificate.

VI

That after September 1, 1948, Lowell Stepp Franklin paid all premiums due on said policy to the Defendant, International Life Insurance Company, which said premiums amounted to $3.00 per quarter up to and including the first day of March 1951; that premium due notices were mailed from the State of Texas by the Defendant to the policy holder, Lowell Stepp Franklin, in California, by United States mail; that the payment of such premiums was mailed in California and received by the Defendant in the State of Texas.

VII

That on December 1, 1950, Lowell Stepp Franklin died in the State and County of San Francisco, California and the beneficiary under the attached policy of insurance,
23 Lulu B. McGee, on the 13th of February, 1951, furnished to the Defendant herein proofs of the death of the said Lowell Stepp Franklin, and demanded payment by Defendant to her of the sum of Five Thousand Dollars ($5,000.00) due under the contract of insurance, but that Defendant, after due consideration of the proofs of death furnished by said claimant, refused to pay and has refused to pay the said sum up until this time.

VIII

That Plaintiff then employed Messrs. Dreyfus, McTernan & Lubliner, Attorneys at Law, 57 Post Street, San Francisco, California, and agreed to pay them a reasonable fee for their services, and authorized them to file suit against the Defendant herein, to collect the insurance due under the terms of the policy attached hereto as Exhibit A.

IX

That on or about June 18, 1951, Messrs. Dreyfus, McTernan & Lubliner instituted in the Superior Court of the State of California in and for the City and County of San Francisco, Cause No. 408,051 styled Lulu B. McGee, Plaintiff v. International Life Insurance Company, a corporation, First Doe, Second Doe and Fifth Doe, individuals, doing business under the firm name and style of Doe Company, a partnership, and Roe Company, a nonincorporated association, Defendants. A photostatic copy of the complaint in said suit is attached hereto as Exhibit C.

X

That on the 18th day of June, 1951, service of process in the said action instituted in California, was made by delivering to and leaving with F. R. Fullenwider, a person in apparent charge of the office of the Insurance Commissioner of the State of California, 1182 Market Street, San Francisco, Califor-
24 nia, two copies of process. This service was made under the California Insurance Code, Section 1610 to 1620, the same being statutes of the State of California purporting to permit service on foreign insurance companies not having a permit to do business in the State of California, by serving the Insurance Commissioner of the State of California, who, in turn, must send by registered mail one copy of the process to the Defendant at its last known principal place of business. Copies of the text of Section 1610–1620, California Insurance Code, are attached hereto as Exhibit D.

XI

That after the Commissioner of Insurance received the copy of the process, he sent same by registered mail to the International Life Insurance Company, P. O. Box 1184, Austin, Texas, by registered mail, return receipt requested, with postage fully prepaid thereon. Such communication, on June 19th, 1951, was deposited in the United States mail at San Francisco, California. Notice of paid service upon the Commissioner of Insurance together with another copy of the said complaint and summons were sent to the Defendant at the above address, by registered mail, return receipt requested, with postage fully prepaid thereon by Plaintiff's attorneys on June 19, 1951. A copy of the receipt issued by the United States Post Office with which the aforesaid letter was registered, showing the name of the sender and the name and address of the person to whom the letter was addressed was duly filed by Alan H. Thieler, one of Plaintiff's attorneys, on June 19, 1951, with the clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, in which the suit styled Lulu B. McGee, Plaintiff, v. International Life Insurance Company, a corporation, et al., Cause No. 408051 was pending.

A copy of the affidavit of Frank Fullenwider, Deputy
25 Insurance Commissioner of the State of California, is attached hereto as Exhibit E, showing that he did cause one copy of the complaint and summons to be sent by registered mail to the International Life Insurance Company at Austin, Texas. The affidavit of Mr. Thieler is attached hereto as Exhibit F. The Defendant actually received all of the material mentioned above as having been sent by registered mail.

XII

The Defendant, International Life Insurance Company, filed and made no appearance in answer to the complaint filed in the Superior Court of California in and for the City and County of San Francisco by Lulu B. McGee.

XIII

That on October 16, 1951, a judgment was entered in Cause No. 408,051, styled Lulu B. McGee, Plaintiff vs. International Life Insurance Company, et al., Defendant, in the Superior Court of the State of California, in and for the City and County of San Francisco, wherein the Court found that International Life Insurance Company had been duly and properly served under the terms of the California Statutes, Section 1610–1620, California Insurance Code, that the Defendant had failed to file and answer, though the time to do so had expired, and the Court, after hearing evidence, entered a judgment against the Defendant in the amount of five thousand and no/100 dollars ($5,000.00), with interest at the rate of seven percent (7%) per annum, from March 2, 1951, to the date of that judgment, which amounted to a total of five thousand two hundred fourteen and 79/100 dollars ($5,214.79), and also assessed against Defendant the amount of costs in the sum of fourteen dollars ($14.00). A copy of this judgment is attached hereto as Exhibit G.

XIV

That following the entry of this judgment, the
26 said judgment was sent to Messrs. Mandell & Wright, together with instructions to them to institute suit thereon in Texas, which was done by the filing, on April 9, 1953, of Cause No. 418,764, styled Lulu B. McGee v. International Life Insurance Company, in the 127th District Court of Harris County, Texas, Service of process has been duly and timely made on the Defendant, and Defendant, by and through its attorneys of record, Messrs. Yancy, Sterrett & Miller, has filed an answer and an amended original answer which are before the Court.

XV

That neither before nor after September 1, 1948, did the Empire Mutual Insurance Company of Arizona or International Life Insurance Company maintain an office of any nature whatsoever in the State of California, nor did either of such companies have or maintain an agent or sales personnel in California, nor did either of such companies actually appoint

any person or officer in the State of California as an agent of any nature for service of Citation or for any other purpose nor has either of such companies or any agents or employees of either company ever been served, within the State of California with summons and complaint in any court proceeding of any nature whatsoever; nor has either company in any way carried on any business activity within the State of California except as herein stipulated.

Wherefore, in light of the above stipulated facts, when considered in connection with any evidence of whatsoever nature introduced by either Plaintiff or Defendant upon trial of this matter, this Court is asked to render its decision and judgment on this question of whether Defendant must pay the judgment here sued.

Agreed and stipulated to this 4th day of October 1954.

27 (S) OTTO J. WEBER, JR.,
MANDELL & WRIGHT,
Attorneys for Plaintiff.

(S) SAM L. STERRETT, JR.,
YANCY, STERRETT & MILLER,
Attorneys for Defendant.

28 EXHIBIT "A" TO STIPULATIONS

EMPIRE NEW 4-WAY POLICY—ACCIDENT, SICKNESS, ACCIDENTAL DEATH, INCREASED SICK BENEFITS IN CASE OF DEATH

This policy provides benefits for Loss of Life from Accidental Means, or for Loss of Limb, Sight, or Time, by Accidental Means or for Loss of Time by Sickness, and extra Sick Benefits in case of Death from Disease, as herein limited and provided.

No. 115281

EMPIRE MUTUAL INSURANCE CO.

(Hereinafter Called the Company)

PHOENIX, ARIZONA

Basic premiums: Monthly, $1.00; Quarterly, $3.00; Semi-annually, $6.00; Annually, $10.95.

Does hereby insure Lowell Stepp Franklin hereinafter referred to as the Insured, subject to all conditions and limitations herein contained, from the day this policy is issued and thereafter as long as this policy is in force.

In the event of the death of the Insured, as herein provided, the indemnity for loss of life shall be payable to Lula B. McGee, Mother (Hereinafter Called Beneficiary).

Consideration: The insurance hereunder is granted in consideration of and reliance upon the truth of each and every answer contained in the signed application, filed in the Home office of the Corporation, and made a part of this contract, the acceptance of the terms and conditions of this policy, and of the payment of the second month's premium of $1.00 payable thirty days after the date of issue; and thereafter, payable in advance, $1.00 monthly, $3.00 quarterly, $6.00 semi-annually, $10.95 annually. The insured is given (30) days from the effective date of this policy within which to examine it. If the policy is not as represented or does not meet the requirements of the Insured, the Insured shall be released from all obligations for the payment of any premium which may be or become due, and this policy shall be deemed cancelled for non-payment of premium as of thirty (30) days from the date of this policy if the premium is not paid. If any premium is paid within thirty days of issue of this policy, such premium will be returned upon request and return of policy within said thirty day period.

Insuring clause: This policy insures against (1) the effects resulting directly and exclusively of all other causes, from bodily injury sustained during the life of this policy solely through External, Violent and Accidental Means (excluding suicide while sane or insane), said bodily injury sustained being hereinafter referred to as "such injury," to the extent hereinafter limited and provided, and (2) disability resulting from illness which is contracted and begins during the life of this policy, and after it has been maintained in continuous force for thirty (30) days from its date, hereinafter referred to as "such illness," to the extent hereinafter limited and provided, and (3) loss of life by accidental means and Increased Sick Benefits in case of

Death, to the extent hereinafter provided and limited in Part III–A and VI.

PART I. ACCIDENT BENEFITS

SPECIFIC LOSSES

Section A

If the Insured shall sustain bodily injury as described in the Insuring Clause, which injury shall independently and exclusively at any and all other causes, continuously and wholly disable the insured from the date of the accident and result in any of the following specific losses within thirty days; provided such loss is sustained, by the damaging of any street railway car, elevated or subway car, railway passenger car, or of any steam ship plying from recognized parts of the United States, Canada or Mexico, or in or on which the Insured is traveling as a fare-paying passenger, or on a pass, in a place regularly provided for the use of passengers;

The Company will pay for loss of:	*First year principal sum*	*Annual increase (Part VII)*	*Value after fifth year*
Life	$3,575.00	$357.50	$5,000.00
Both feet	3,575.00	357.50	5,000.00
Both hands	3,575.00	357.50	5,000.00
Sight of both eyes	3,575.00	357.50	5,000.00
One hand and one foot	3,575.00	357.50	5,000.00
One hand and sight of one eye	3,575.00	357.50	5,000.00
One foot and sight of one eye	1,750.00	175.00	2,625.00
Either hand	1,750.00	175.00	2,625.00
Either foot	1,000.00	100.00	1,500.00
Sight of either eye			

*The maximum benefits hereunder shall not exceed $5,000.00 as limited by law.
This is a limited policy—read it carefully.

28a (1) "Loss" shall mean * * * regard to hands, arms, feet or legs, complete * * * through or above wrist, elbow, ankle or knee joint; * * * with reference to eye, means entire or * * * loss of sight. No indemnity will be paid under any * * * for more than one of the specific * * * which provision is made in the Schedule of Losses and Indemnity under Part I, and in no event will the amount paid to the insured or the beneficiary exceed the maximum sum so provided. No indemnity shall be paid for loss of time if indemnity is paid for

any of the specific losses under Part I, and the occurrence of any of the said losses shall at once terminate the insurance effected by this policy except as to the indemnity payable for said loss.

Section B. $100.00 Monthly Maximum Benefit

If the Insured shall be immediately, wholly and continuously diabled by the means and under the conditions as set forth in Part I and not cause any of the Specific Losses under Part I, and be prevented by such injury so received from performing any and every remunerative duty pertaining to any gainful occupation, the Company will pay, commencing with the first day of disability and not exceeding twenty-four consecutive months, indemnity at the rate of One Hundred Dollars ($100.00) per month, plus ten percent yearly accumulations as shown in Part VII.

PART II

If such loss is sustained:

A. Automobiles, taxicabs, busses, trucks, or horse-drawn vehicles. By the damaging of any automobile, taxicab, motor bus, automobile stage, truck or horse-drawn vehicle in which the Insured is riding or driving at the time of the injury as a driver, employee, helper, operator, owner or passenger, or is accidentally thrown from within such damaged vehicle while riding therein.

B. Public highways, roads and streets—pedestrian. By being struck, knocked down or run over while walking or standing on a public highway, including public streets, in any city, town, or village, by any vehicle being operated under its usual power at the time of the accident.

C. Farm accidents. While actually riding in or driving upon and caused by actual contact with any motor-driven or horse-drawn harrow, plow, or threshing, mowing, reaping or binding machine, farm tractor, cultivator, lister, stalk cutter, corn planter, corn picker, combine, seeder, disc, rake, manure spreader or grain drill, while such implement or machine is in motion and in actual use in and about the operation of the farm.

The Company will pay under Part II

Ten (10) percent of the amounts listed for specific Losses in Part I, or if the Insured shall be immediately, wholly and continuously disabled and does not suffer any such such specific loss and be prevented by injury so received from performing any and every remunerative duty pertaining to any gainful occupation, the Company will pay, commencing with the first day of disability and not exceeding twelve consecutive months, indemnity at the monthly rate of Twenty-Five Dollars ($25.00) during the first month of disability, and thereafter at the monthly rate of Fifty Dollars ($50.00).

PART III

A. All other accidents (loss of life). The Company will pay for loss of life due to any accidental means, not otherwise covered by this policy, and if not otherwise excluded under any provisions, and which shall have caused continuous total disability from date of accident to date of death, and also provided such loss occurs within ninety days from date of accident, the sum of One Hundred Dollars ($100.00), plus ten percent (10%) accumulations as shown in Part VII.

B. All other accidents (benefits for total disability). If the Insured shall suffer "such injury" in consequence of any accident not otherwise covered by this policy and not otherwise excluded under any other provision, and be immediately and wholly prevented from attending to any and every kind of work or business, the Company will pay for the period of such disability, commencing with the first day of such disability and not exceeding two consecutive months, indemnity at the monthly rate of Twenty Dollars ($20.00), plus ten percent (10%) yearly accumulations as shown in Part VII.

C. Payment for doctor's fees (non-disabling injuries). Should the Insured sustain accidental injury by the means and the conditions as set out in Parts I, II, or III, and "such injury" requires immediate medical or surgical treatment by a duly licensed physician or surgeon and the Insured makes no other claims on account of that injury, the Company will reimburse the Insured for the cost thereof, not to exceed $5.00, upon pres-

entation of receipted bill for the services for such injury, if presented within ninety (90) days from such accident.

Part IV. Sickness Benefits

SPECIFIED CONFINING SICKNESS

A. The Company will pay, after policy has been in continuous force for thirty days, commencing with the first day of disability, and for a period not to exceed ten consecutive weeks, indemnity at the monthly rate of Thirty Dollars ($30.00) during the first seven days of disability and indemnity at the monthly rate of Sixty Dollars ($60.00) during the next fourteen days of disability and thereafter at the monthly rate of One Hundred Dollars ($100.00) for disability resulting from diseases listed hereunder, provided that the Insured shall be necessarily, totally and continuously confined within the house or hospital and be regularly treated therein by a legally qualified physician or surgeon and shall be wholly prevented from performing any and ever kind of work or business.

B. The diseases for which indemnity shall be paid under Part IV are as follows: Goiter (when operated), Typhoid Fever (by Widal Test Only), Scarlet Fever, Lichen Planus, Hives, Small Pox, Diphtheria, Spinal Meningitis, Sty, Erysipelas, Acute Cerebral Meningitis, Abcess of Brain (when operated), Varicloid, Trichinosis, Tape Worm, Measles, Chicken Pox, Whooping Cough, Epilepsy, Chorea (St. Vitus Dance), Vaccina Fever, Yellow Fever, Scurvy, Shingles (Herpes Zoster), Barber's Itch, Lockjaw (Tetanus), Hydrophobia, Ivy Poisoning, Acute Yellow Atrophy of the Liver, Acute Lead Poisoning, Malignant Pustule (Anthrax), Mushroom Poisoning, Hemophilia, Phlebitis, Charcot's Joint Disease, Leprosy, Malta Fever, Trachoma, Noma, Psoriasis, Rubella, Varicella, Oak Poisoning, Encephalitis (Sleeping Sickness), Embolism, or Osteomalacia, but not including their complications or consequences.

Part V. All Other Sickness

A. Confining sickness. The Company will pay, after this policy has been in continuous force for thirty days, beginning with the first day of disability resulting from sickness not listed

in Part IV–B, and if not otherwise excluded under any other provision of this policy, for a period not to exceed two consecutive months, indemnity at the monthly rate of Twenty Dollars ($20.00), plus ten percent (10%) yearly accumulations as shown in Part VII, provided that the Insured shall be necessarily, totally and continuously confined within the house or hospital, and be regularly treated therein by a legally qualified physician or surgeon and shall be wholly prevented from attending to any kind of work or business.

B. Non-confining sickness. Or, if such disability resulting from sickness not listed in Part IV–B, shall necessarily disable and prevent the Insured from attending to any and every kind of work or business and shall necessarily be treated by a legally qualified physician or surgeon at least once every seven days, though not necessarily house confined, the Company will pay at the rate of Ten Dollars ($10.00) per month for a period of not exceeding two weeks. Indemnity for confining and non-confining sickness shall not exceed an aggregate of two months for any one period of disability.

Part VI. Increased Sick Benefits in Case of Death

If such sickness as defined herein shall result in death, the sickness benefits payable under this policy shall be increased Fifty Dollars ($50.00) after this policy has been kept in continuous force without lapse for six months, with double this amount or One Hundred Dollars ($100.00), after this policy has been kept in continuous force without lapse for one year, provided such death occurs within thirty days from date of the beginning of such sickness. Payment of any of the above amounts shall be paid to the person named herein as beneficiary.

Part VII

Additional benefits, fifty percent accumulations. Each year this policy is in force without default, shall add ten percent (10%) to the amount payable for Loss of Life, or Specific Losses or Monthly Indemnities, until such accumulations reach Fifty Percent (50%) at the beginning of the sixth consecutive year (except Part VI), and thenceforth shall remain the same; pro-

vided, however, that the maximum benefits payable under this policy shall not exceed $5,000.00 as limited by law.

PART VIII

Emergency benefit—registration, identification and financial aid up to $200.00. The Company will register the person insured hereunder, and, if by reason of any accidental injury or sickness, the Insured shall be physically unable to communicate with relatives or friends, will upon receipt of a message giving this policy number, immediately transmit to such relatives or friends as may be known to it, any information respecting the Insured, and will defray all expenses necessary to put the Insured in communication with and in the care of relatives or friends, provided such expense shall not exceed the sum of Two Hundred Dollars ($200.00). This benefit to be in addition to any other benefit, provided, however, that the maximum benefit paid under this policy shall not exceed $5,000.00, as limited by law.

PART IX

Additional benefit for hospital expense—sickness or accident. If the Insured shall be confined to a licensed hospital while receiving monthly indemnity under Parts I-B, II, III-B, IV, and V, the rate of said indemnity shall be increased fifty percent (50%), but not exceeding a period of one month; provided that the insured is necessarily and legally liable for payment for the care * * *

28b PART X. RETURN OF PREMIUM

In the event of the accidental death of the Insured under the provisions of this policy, provided this policy has been in continuous force for one year, the Company agrees to pay in addition to the amount otherwise payable, an amount equal to all the premiums paid by the Insured on this policy, plus interest at the rate of 6% per annum from the date of the payment of each of said premiums to the date of death of the Insured, provided, however, that in no event will the Company pay in excess of $5,000.00, as limited by law.

PART XI

Quarantine indemnity. If, as a result of quarantine imposed by legal authorities on account of any contagious disease of some member of the herein named Insured's family, other than the Insured himself, the Insured shall be confined to his home, the Company will pay benefits therefor at the rate, and for the period of time not to exceed that allowed for confining sickness as provided under Part V–A herein.

PART XII. NON-CANCELLABLE AND RENEWABLE

This policy shall be non-cancellable and renewable except for fraud or non-payment of premiums until the maximum benefit of Five Thousand ($5000.00) shall have been paid.

PART XIII. LIMITATIONS

(1) "Riding In" as used in this policy does not extend to or cover the Insured while on the steps, platform or running board. (2) No benefits will be paid for disability resulting from any abdominal operation performed in the first six (6) months this policy is in force. (3) Monthly indemnity for "such injury" or "such illness" shall be payable as provided only for the time that Insured is under the personal professional treatment, at least once each seven days, of a licensed physician or surgeon, or osteopath (other than Insured), beginning with the first regular attendance of said Doctor, Osteopath, or Surgeon, and ending with the last visit, anything in this policy to the contrary notwithstanding. (4) If the Insured is engaged in Military or Naval Service anywhere in the world while this policy is in force, and during such period sustain any form of accidental injury as defined by the insuring clause, including those specified in Parts I and II, resulting in death or disability, the Company will pay 50% of the benefits provided under Parts III A and B, or in the event of death or disability resulting from sickness as provided by the terms of the policy, including any sickness specified under Part IV, the Company will pay 50% of the benefits provided under Part V and VI respectively, any provisions to the contrary notwithstanding. (5) All benefits shall be fifty (50%) percent of

the amount of benefits stated in this policy if the Insured is or becomes sixty years of age, and/or is under the attained age of fifteen years, on date of disability or death.

NOT COVERED

(6) This policy does not cover any injury, disability, loss of life or any other loss sustained by the insured, unless sustained in the United States of America, the Dominion of Canada, or Mexico (except on any steamship as provided in Part 1, and except as provided under "limitations" above, Paragraph 4), nor does it cover any loss caused or contributed to, directly, wholly or partly; by suicide or any attempt thereat while sane or insane; or as a result of insanity or mental infirmity; or by injury intentionally inflicted upon the Insured by himself while sane or insane, or while or as a result of committing a felony or assault; or from taking poison or inhaling gas (whether voluntary or involuntarily); or while riding or driving in races; or testing an automobile on any track or speedway; or while violating any criminal law; or while intoxicated under the influence of or affected by or resulting directly or indirectly from intoxicants or narcotic; or by venereal disease or its complications; or for any injury to, or disease or ailment of the genito-urinary organs not common to both sexes; or from childbirth or pregnancy, or any complication or result of either. No indemnity shall be payable for hernia in any form, whether incurred before or after date of policy, or for injuries fatal or non-fatal (except accidental drowning) for which there shall be no visible mark or contusion or wound on the exterior of the body at the place of injury; or where internal injuries are not disclosed by an autopsy.

PART XIV. STANDARD PROVISIONS

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance. No reduction shall be made in any indemnity herein provided by reason of change in the occupation of the insured or by reason of his doing any act or thing pertaining to any other occupation.

2. No statement made by the applicant for insurance not

included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In event of accidental death immediate notice thereof must be given to the Company.

5. Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the Company at Phoenix, Arizona, or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period

for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

8. The Company shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

9. All indemnity provided in this policy for loss other than that of time on account of disability will be paid within sixty days after receipt of due proof.

10. Upon request of the insured and subject to due proof of loss all accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity for loss of life of the insured is payable to the beneficiary if surviving the insured, and otherwise to the estate of the insured. All other indemnities of this policy are payable to the insured.

12. If the insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the insured and surrender of the policy, will cancel the same and will return to the insured the unearned premium.

13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the insured resides at the time this policy is issued, such limitation is hereby

extended to agree with the minimum period permitted by such law.

29 *Exhibit "B" to Stipulations*

Reinsurance certificate to be attached to Policy No. 115,280. Insured. Lowell S. Franklin, 2669 California Street, San Francisco 15, California. Issued by Empire Mutual Insurance Company, Phoenix, Arizona.

This is to certify that International Life Insurance Company, Austin, Texas, in consideration of the transfer to it by the above named Insured of all his right, title and interest in and to all mortuary funds of the Empire Mutual Insurance Company of Phoenix, Arizona, and in consideration of the payment of the premiums specified in, and in accordance with the terms of, the above described policy, hereby reinsures and assumes the liability under the above policy, subject to the terms and conditions of the reinsurance agreement between the International Life Insurance Company, Austin, Texas, and the Empire Mutual Insurance Company, Phoenix, Arizona, which said reinsurance agreement is printed on the reverse side hereof and is hereby referred to as if incorporated herein word for word, provided that the above policy is in full force and effect on the effective date of such reinsurance agreement, and expressly subject to the following provisions, conditions, amendments and modifications:

(1) Part XII is hereby amended to read as follows: "This certificate and the policy reinsured hereby may be renewed with the consent of the Company on any premium due date but only by the payment of the required premium and acceptance of such premium by the Company."

(2) "Special Provisions" 3, 4, 12 and 13 shall be voided and this certificate and the policy reinsured hereby shall be non-assessable.

(3) All references to "Company" in the policy hereby reinsured shall hereafter refer to the International Life Insurance Company, "Austin, Texas" shall be substituted for "Phoenix, Arizona" wherever such words occur in such policy and all references to "office" or "home office" in such policy shall here-

after refer to the home office of the International Life Insurance Company at Austin, Texas.

The retention of this certificate or the payment of a premium hereon shall constitute acceptance hereof by the above named policyholder.

In Witness Whereof, the International Life Insurance Company, Austin, Texas, has caused this Certificate to be executed and become effective this 1st day of September, A. D. 1948.

SIGNATURE ILLEGIBLE.
President.

M. K. TURNER,
Secretary.

For Empire's 4-Way (Form 17–10M–7–46) policy.

28c Read your policy. Understand your policy. Write us if there is anything that needs explaining.

Empire New 4-Way Policy: 1. Sickness; 2. Accident; 3. Accidental Death; 4. Increased Sick Benefits in Case of Death.

How to present a claim for benefits: Just notify the Company at its Home Office at Phoenix, Arizona, giving the number of the policy. That's all. Claim blanks and complete information will be promptly mailed to you.

Issued by Empire Mutual Insurance Company, Home Office Phoenix, Arizona, Form A&HR–7–1–43.

SPECIAL PROVISIONS

1. A grace period of thirty (30) days beyond the due date shall be granted on any payment of premiums by the Insured under this policy.

2. The rate charged for this policy is based upon an annual premium payable in advance. For the convenience of the Insured, the premium may be paid, as set forth on Page One of the policy, monthly, quarterly, semi-annually, or annually.

3. In the event the premiums stated in the policy are found to be inadequate to pay claims and general operating expenses, the Company may, with the written approval of the commission, increase the premiums.

4. In the event of any unexpected number of deaths the Company may, with the written consent or at the direction of

the commission, levy assessments on members, which shall be placed in the mortuary fund.

5. Upon written application, the submission of acceptable evidence of insurability, and payment of all arrearages, made within one year from the date of lapse or after notice of lapse, whichever is longer, a lapsed policy may be reinstated. As a result of such reinstatement no benefits provided by such policy shall be reduced, and the benefits accrued shall remain in effect as if no lapse occurred.

6. If the age of the Insured has been misstated, the amount payable under this policy shall be the amount due at the correct age of the Insured at time of death or disability.

7. After this policy has been in continuous force without lapse during the lifetime of the Insured for a period of two (2) years from the date of issuance or last reinstatement, it shall be incontestable except for non-payment of premiums.

8. This policy shall be conclusively deemed to be made, executed and performed and the obligation or liability arises in connection therewith, at the Home Office of the Company at Phoenix, Arizona, regardless of where the physical delivery of said policy is made, and all interpretations and questions arising hereunder shall be governed by the laws of the State of Arizona.

9. Strict compliance on the part of the Insured and beneficiary with all the provisions and agreements of this policy and the application signed by the Insured, is a condition precedent to recovery of any indemnity otherwise payable hereunder.

10. If the Insured is disabled by injury or sickness for more than thirty days, he, or his representative, shall furnish the Company every thirty days, or as soon thereafter as may be reasonably possible, with a report of the attending physician or surgeon fully stating the condition of the Insured.

11. No person shall be entitled to more than two policies of this general form issued by the Company, and no indemnity shall be paid to any person under more than two policies of this general form, and all premiums paid will be refunded in the event more than two policies have been issued. The total indemnity paid by the Company to any one person regardless

of whether or not he carries more than one policy shall not be in excess of Five Thousand Dollars ($5,000.00), as limited by law.

12. After the policy has been in continuous force for two years from date of issue or last reinstatement, the Insured may, at his option, by paying an additional premium of Fifty (50¢) Cents a month, which shall be set aside to the Mortuary and Reserve Fund, have the privilege of obtaining an Endorsement Rider doubling the benefits payable under this policy with the exception of Part I, benefits under which shall remain the same.

13. All premiums for this policy shall be credited to two funds. (1) Mortuary Fund, and (2) General Operating Expense Fund. Into the Mortuary Fund shall be set aside after the third month from date of issue, 25% of all premiums collected on this certificate during the first policy year, and 60% of all premiums collected during the second and each succeeding policy year thereafter, which shall include all premiums upon reinstatements except that upon reinstatement there may be excluded one month's premium for agent's commissions. The remainder of each premium collected shall be set aside to the General Operating Expense Fund. The Mortuary Fund and the General Operating Expense Fund shall be disbursed only in accordance with the provisions of this policy and the laws of the State of Arizona governing this Company.

14. This policy shall be in force for the term beginning at 12 o'clock Noon Mountain Standard Time on the date this contract is issued and continue so long as the premiums are paid in compliance with the provisions set forth herein.

In witness whereof, the Empire Mutual Insurance Company has caused this policy to be signed by its President and its Secretary, at the Home Office in Phoenix, Arizona, this April 21, 1944.

[SEAL]

CHAS. C. NIEHOUSE,
President.

B. W. WRIGHT,
Secretary.

30 AGREEMENT BETWEEN EMPIRE MUTUAL INSURANCE COMPANY AND INTERNATIONAL LIFE INSURANCE COMPANY

This agreement made and entered into by and between Empire Mutual Insurance Company, a benefit insurance corporation, existing and doing business under Chapter 95, Session Laws of 1943, Laws of Arizona, with its principal office in Phoenix, Arizona, hereinafter called Association; and International Life Insurance Company, an insurance corporation organized and existing under Chapter Three, Title 78, Vernon's Annotated Civil Statutes of Texas, with its principal office in Austin, Texas, hereinafter called Company, both Association and Company being duly authorized to transact business within the State of Arizona under and by virtue of certificates of authority duly issued as provided by law; but it is expressly provided that all references herein to members, membership, policyholders, insurance, meetings, mortuary fund, premiums, assessments, policies, and all other terms used as to Association shall be construed to apply to and affect only those not included in the Life Group or class of the Association, anything else herein to the contrary notwithstanding.

WITNESSETH

Whereas, it is deemed to be to the best interest of the policyholders of Association that its policies now in force be insured in Company upon the terms and conditions herein set forth; and

Whereas, a majority of the Board of Directors of the Association at a duly called meeting held on the 12th day of July, 1948, at the offices of the Association in Phoenix, Arizona, called for the purpose of considering the submission to the membership of the Association, the Corporation Commission of the State of Arizona and to the Board of Insurance Commissioners of the State of Texas of detailed plans for changing their insurance to a legal reserve insurance company, did vote to submit plans of changing the insurance of Association to a legal reserve company, and authorized the President and Secretary of the Association to enter into this

agreement with Company for the purpose of effecting such change, which shall be effective and binding in accordance with the terms hereof when approved by the membership of Association at a meeting duly called for that purpose, and to do any and all other things necessary or proper to effect such change; and

Whereas, it is the desire of the parties hereto to effect an arrangement whereby the insurance interests of the policyholders of Association will be conserved to the greatest possible extent and policyholders of the Association shall have offered to them by Company, in the manner provided for herein, a Company reinsurance certificate, insuring the insurance liability of the assessment policy now held by each policyholder in the Association, subject to the terms and conditions believed to be just, fair and equitable to all parties concerned as hereinafter recited in this agreement and in the Company reinsurance certificate herein referred to;

Now, therefore, in consideration of the mutual benefits to be received by the respective parties hereto and the mutual agreements herein contained, Association and Company hereby contract as follows:

Article I

For each valid outstanding policy of Association in full force and effect as of the effective date of this agreement, Company will offer to the legal holder of each such policy for the purpose of insuring the liability under such policy, an applicable Company reinsurance certificate, similar in all respects to whichever of the reinsurance certificates attached hereto is designated for the particular type of policy held by each such legal holder of such Association policy, and subject also to the following conditions:

(a) Each such reinsurance certificate to be issued by Company hereunder to the members and policyholders of Association shall be nonassessable.

(b) The premium on any such Company reinsurance certificate and the policy reinsured thereby shall be an amount equal to the amount payable on each individual Association policy, and such premiums shall hereafter become due and

payable to Company upon each such individual reinsurance certificate on the date upon which the next premium or assessment would have otherwise become due and payable under each individual Association policy, and the Company reinsurance certificate and the policy reinsured thereby may be renewed only with the consent of the Company on any premium due date by the payment of the required premium and acceptance of such premium by the Company.

(c) Each such Company reinsurance certificate shall become effective on the effective date of this agreement and shall continue to be effective from such date until the date the next premium or assessment would have otherwise become due and payable on the individual Association policy reinsured by each such Company reinsurance certificate, and shall thereafter be effective only in the event of a renewal thereof under the conditions herein set out. In the event that any Insured under any policy of Association is not alive on the effective date of this agreement, the Company reinsurance certificate shall not become effective as to such insured who is not alive on the effective date of this agreement but shall be effective as to any other members who may be insured under the same policy of Association who are alive on the effective date of this agreement and are disclosed by Association records.

(d) On the effective date of this agreement all policies of the Association shall be and become null and void except as modified and reinsured hereunder.

Article II

The Company shall mail to the last known address of, or deliver to, each holder of a valid, outstanding policy of Association a Company reinsurance certificate written in pursuance to the provisions hereof as soon as practicable after the effective date of this agreement.

Article III

Receipt by the Insured or the legal holder thereof, of any Company reinsurance certificate issued in pursuance to the provisions of this agreement, shall be deemed acceptance and

ratification of this agreement and the insurance of such Insured's Association policy by the Company reinsurance certificate, in accordance with the terms of this agreement unless such insured or the legal holder of any Association policy shall within sixty (60) days after the effective date of this agreement, return such Company reinsurance certificate to the Company at its Home Office together with notice of his refusal to accept the Company reinsurance certificate and make request for the payment of the actuarial portion of the net mortuary fund of Association as hereinafter defined apportionable to such member who refuses to accept the reinsurance certificate offered him. In the event of such refusal and request, the Company will remit to any such Insured or legal holder of said policy such actuarial portion. The net mortuary fund shall be determined as follows: To the mortuary fund (including the entire statutory deposit with the State Treasurer of Arizona) of Association existing on the effective date of this agreement, shall be added the mortuary portion of all premiums and assessments due and payable to Association prior to the effective date of this agreement. From this sum shall be deducted the amounts of valid claims arising under valid and outstanding policies prior to the effective date of this agreement and the mortuary portion of all premiums received by Association prior to the effective date of this agreement, which are paid for insurance coverage more than one month beyond the effective date of this agreement. The resulting net Mortuary Fund shall be prorated among the valid outstanding insurance policies of Association in force on the effective date of this agreement in proportion to the ratio that the monthly rate payable by each Insured under Association's policy bears to the total monthly rate payable by all Insureds under all valid outstanding Association policies on the effective date of this agreement. The amount thus derived as apportionable to any such insurance policy shall be defined as the Actuarial Portion of the Mortuary Fund of Association apportionable to the member or members holding each such Association policy.

Article IV

Association shall pay from its general funds all salaries, accounts, claims, rents, attorneys' fees or other obligations then due or incurred by the effective date of this agreement except that all valid policy claims arising under valid and outstanding policies of Association prior to the effective date of this agreement shall be assumed by Company; and Company will also pay all such liabilities of Association which are due and payable or incurred prior to the effective date hereof that may not be paid by Association when due; provided, however, that Company shall have recourse against all persons liable for any amounts so paid by Company.

Article V

On the effective date of this agreement Association shall by proper instruments or other legal means transfer to Company the mortuary fund (including the entire statutory deposit with the State Treasurer of Arizona) belonging to Association and shall deliver to Company all books, records, files and all other material pertaining to any and all policies issued by the Association and to any and all other business of the Association. On the effective date of this agreement, the State Treasurer of the State of Arizona shall be, and he is hereby, authorized and directed to deliver immediately to Company all cash and securities which constitute the entire statutory deposit of Association; and upon such delivery by the State Treasurer of Arizona to Company, the State Treasurer of Arizona and the sureties upon his bond shall be fully relieved of any and all further liability to Association, its policyholders, and any other claimants to said fund.

Association agrees to transfer to Company from Association Expense or General Fund, the General Fund portion of all premiums received by Association prior to the effective date of this agreement, which are paid for a period more than one month beyond the effective date of this agreement.

Company is hereby given full authority to receive, receipt for, endorse, sell, assign, transfer, release, and deliver by and in its own name or the name of Association whenever or wher-

ever necessary, any and all of said funds and assets to be received hereunder, and in its own name, or in the name of Association, to institute, maintain and defend any and all actions and execute any and all instruments necessary or desirable growing out of its rights and obligations hereunder.

Upon receipt of such mortuary fund and assets of Association, Company shall make payment of all valid claims arising prior to the effective date of this agreement under valid and outstanding policies of Association, shall pay their actuarial portion of such mortuary funds to members of Association who refuse to accept the reinsurance certificate offered them and who make proper request therefor within sixty (60) days from the effective date of this agreement, and shall transfer to the "Premium Paid in Advance" account of the Company the mortuary portion of all premiums received by Association prior to the effective date of this agreement which are paid for insurance coverage more than one month beyond the effective date of this agreement.

The entire amount of the mortuary fund and other assets of Association, to be received by Company hereunder after the disbursements and transfer provided for hereinabove, shall thereafter be effectually the property of the Company as a lump sum consideration for the issuance by the Company of non-assessable policies at the rates specified herein, which rates are the same as such policyholders have been paying to Association.

This agreement shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns.

This agreement shall be and become effective at noon (Mountain Standard Time) on the 1st day of September, 1948, upon ratification by not less than fifty-one per cent (51%) of the members of the Association at a meeting duly called for that purpose, authorization or ratification by the stockholders and Board of Directors of Company, execution hereof by the officers of Association and of Company, and proper certification thereof to the Corporation Commission of the State of Arizona and to the Chairman of the Board of Insurance Commissioners of the State of Texas.

In witness whereof, the parties hereto have caused this contract to be executed in quadruplicate originals, each of said parties acting herein by and through its duly authorized officers this 14th day of July, 1948.

EMPIRE MUTUAL INSURANCE COMPANY,

By D. E. BUFFINGTON,

President, Association.

INTERNATIONAL LIFE INSURANCE COMPANY,

By [Signature illegible],

President, Company.

Attest:

A. E. STELZER,

Secretary.

Attest:

L. ROWELL,

Assistant Secretary.

The foregoing agreement is hereby approved this the 14th day of July, 1948.

BOARD OF INSURANCE COMMISSIONERS OF THE STATE OF TEXAS,

By GEORGE B. BUTLER, *Chairman,*

The foregoing agreement is hereby approved this the 15th day of July, 1948.

CORPORATION COMMISSION OF THE STATE OF ARIZONA,

By W. T. WRIGHT.

By YALE McFATE.

31 *Exhibit "C" to stipulations*

DREYFUS, MCTERNAN & LUBLINER
57 POST STREET, SAN FRANCISCO
Telephone: GArfield 1-8284
Attorneys for Plaintiff

In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 408054

LULU B. McGEE, PLAINTIFF

v.

INTERNATIONAL LIFE INSURANCE COMPANY, A CORPORATION, FIRST DOE, SECOND DOE, THIRD DOE, BLACK COMPANY, A CORPORATION FOURTH DOE AND FIFTH DOE, INDIVIDUALS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DOE COMPANY, A PARTNERSHIP, AND ROE COMPANY, A NON-INCORPORATED ASSOCIATION, DEFENDANTS

Complaint for breach of contract of insurance

Plaintiff complains of defendants, and each of them, and for cause of action alleges:

I

The defendant, International Life Insurance Company, is a corporation organized and existing under the laws of the State of Texas and doing business in the City and County of San Francisco, State of California.

II

The true names and identities of First Doe, Second Doe, Third Doe, Black Company, a corporation, Fourth Doe and Fifth Doe, individuals, doing business under the firm name and style of Doe Company, a partnership, and Roe Com-
31a pany, a non-incorporated association, are unknown to plaintiff, but whenever the same may be ascertained, plaintiff prays leave of the Court to insert the same herein, together with all necessary allegations to properly charge them.

III

On the 21st day of April, 1944, The Empire Mutual Insurance Company, a corporation organized and existing under the laws of the State of California, in consideration of the quarterly payments to it of $3 by Lowell Stepp Franklin, made its policy of insurance in writing, No. 115281, a copy of which is hereto attached, marked Exhibit "A", and by this reference made a part of this Complaint, and thereby insured the life of said Lowell Stepp Franklin in the sum of five thousand dollars ($5,000).

IV

That plaintiff, Lulu B. McGee, is the mother of Lowell Stepp Franklin, now deceased, and is the beneficiary named in the said policy No. 115281, on the life of Lowell Stepp Franklin.

V

That the said Lowell Stepp Franklin duly kept and performed all the terms and conditions on his part to be kept and performed; that he paid all the premiums upon said policy as they accrued up and until, on or about, the 1st day of September, 1948; that on or about the 1st day of September, 1948, the defendant above named, for a valuable consideration, to wit, the transfer to it by Lowell Stepp Franklin of all his right, title and interest in and to all mortuary funds of the said Empire Mutual Insurance Company and the payment of the premiums specified in, and in accordance with the terms of the above described policy, undertook to and did assume the insurance contract or obligation theretofore existing against the said Empire Mutual Insurance Company, and pursuant thereto, on or about the 1st day of September, 1948, the said
31b defendant did execute and deliver to Lowell Stepp Franklin its Reinsurance Certificate No. 115280, a copy of which is hereto attached, marked Exhibit "B" and by this reference made a part of this Complaint.

VI

That thereafter the said Lowell Stepp Franklin paid all premiums due on said policy to defendant International Life

Insurance Company, which amounted to $3 per quarter up to and including the 1st day of March, 1951; that said Lowell Stepp Franklin duly kept and performed all of the terms and conditions on his part to be kept and performed; that on the 11th day of December, 1950, the said Lowell Stepp Franklin died at the City and County of San Francisco, State of California.

VII

That after the said death of the said Lowell Stepp Franklin, the said Lulu B. McGee, plaintiff herein, on the 13th day of February, 1951, furnished to defendant proof of the death of the said Lowell Stepp Franklin; and demanded of defendant International Life Insurance Company the payment to her of the sum of $5,000 due to her under the said contract of defendant International Life Insurance Company; that said defendant refused and still refuses to pay said sum of $5,000, and said defendant has not paid said sum of $5,000, or any part thereof, and that there is now due, owing and unpaid from said defendant to plaintiff the sum of five thousand dollars ($5,000); and interest thereon.

Wherefore, plaintiff prays judgment against defendants, and each of them, for the sum of five thousand dollars ($5,000), with interest thereon, her costs of suit herein incurred, and reasonable attorneys' fees.

DREYFUS, McTERNAN & LUBLINER,
Attorneys for Plaintiff.

32 STATE OF CALIFORNIA
City and County of San Francisco, ss:

Lulu B. McGee, being first duly sworn, deposes and says: That she is the Plaintiff in the above entitled cause, that she has read the foregoing Complaint for Breach of Contract of Insurance, knows the contents thereof, and that the same are true of her own knowledge, except as to those matters thereon stated to be upon information or belief, and as to those matters, she believes it to be true.

LULU B. McGEE.

Subscribed and sworn to before me this 15th day of * * * 1951.

[SEAL] CLARA E. HAY,
Notary Public, in and for the City and County of San Francisco, State of California.

Exhibit "D" to stipulation—Excerpts From the California Unauthorized Insurers' Process Act

Omitted. Printed side page 41, *infra.*

35 *Exhibit "E" to stipulations*

LAW OFFICES OF DREYFUS, McTERNAN & LUBLINER
57 POST STREET, SAN FRANCISCO 4
Garfield 1-8284

In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 408051

LULU B. McGEE, PLAINTIFF
vs.
INTERNATIONAL LIFE INSURANCE COMPANY, A CORPORATION, ET AL., DEFENDANTS

AFFIDAVIT OF FRANK FULLENWIDER

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Frank Fullenwider, being first duly sworn, deposes and says:

That he is and at all times specified herein was Deputy Insurance Commissioner of the State of California;

That on the 18th day of June, 1951, and in his capacity as Deputy Insurance Commissioner, there was delivered to, and left with him at the Office of the Insurance Commissioner, 1182 Market Street, San Francisco, California, two copies of the Complaint filed and Summons issued in the above-entitled case;

That he did forthwith and on the same day in his said capacity and on behalf of the Insurance Commissioner of the

State of California, and in compliance with California Insurance Code Section 1612, cause one copy of said complaint
35a and summons to be placed in an envelope addressed to: International Life Insurance Company, Austin, Texas, which envelope was then sealed, registered, and postage fully paid thereon and deposited in the United States mail at San Francisco, California; that there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

Frank Fullenwider.
FRANK FULLENWIDER.

Subscribed and sworn to before me this 17th day of August 1953.

JOHN N. ANDREWS,
Deputy Insurance Commissioner.

36 *Exhibit "F" to stipulations*

DREYFUS, McTERNAN & LUBLINER
57 POST STREET, SAN FRANCISCO
Telephone: GArfield 1-8284
Attorneys for Plaintiff

Filed June 19, 1951. Martin Mongan, Clerk.

In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 408051

LULU B. McGEE, PLAINTIFF

v.

INTERNATIONAL LIFE INSURANCE COMPANY, A CORPORATION, FIRST DOE, SECOND DOE, THIRD DOE, BLACK COMPANY, A CORPORATION, FOURTH DOE AND FIFTH DOE, INDIVIDUALS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DOE COMPANY, A PARTNERSHIP, AND ROE COMPANY, A NON-INCORPORATED ASSOCIATION, DEFENDANTS

AFFIDAVIT OF COMPLIANCE

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Alan H. Thieler, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiff, Lulu B. McGee, in the above entitled action; that on the 18th day of June 1951, he did deliver to and leave with Mr. F. I. Fullenwider, a person in apparent charge of the office of the Insurance Commissioner of the State of California, 1182 Market Street, San Francisco, two (2) copies of the complaint filed and summons issued herein; that on the 19th day of June 1951, he gave notice of said service of process to defendant, Inter-
36a national Life Insurance Company, a corporation, by placing said Notice of Service of Process, a copy of which is attached hereto, together with one copy each of the Complaint filed and Summons issued herein in an envelope addressed to: International Life Insurance Company, P. O. Box 1184, Austin, Texas, which envelope was then sealed, Registered and Return Receipt Requested, and postage fully prepaid thereon, and thereafter was on the 19th day of June 1951, deposited in the United States Mail at San Francisco, California; that there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed; that on the 19th day of June 1951, he did file with the Clerk of the Court in which the above entitled action is pending the receipt issued by the United States Post Office with which the aforesaid letter is registered showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed.

ALAN H. THIELER.

Subscribed and sworn to before me this 19th day of June, 1951.

ED. R. ABBOTT,
Notary Public in and for the City and County of San Francisco, State of California.

37 *Exhibit "G" to stipulations*

DREYFUS, McTERNAN & LUBLINER
57 POST STREET, SAN FRANCISCO
Telephone: GArfield 1-8284
Attorneys for Plaintiff

Endorsed. Filed Oct. 11, 1951. Martin Mongan, Clerk. D. Fitzpatrick, Deputy Clerk.

Recorded: Vol. 901, page 331, Oct. 11, 1951. Martin Mongan, Clerk. By R. D. Carroll, Deputy Clerk.

In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 408051

LULU B. McGEE, PLAINTIFF

v.

INTERNATIONAL LIFE INSURANCE COMPANY, A CORPORATION, FIRST DOE, SECOND DOE, THIRD DOE, BLACK COMPANY, A CORPORATION, FOURTH DOE AND FIFTH DOE, INDIVIDUALS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DOE COMPANY, A PARTNERSHIP, AND ROE COMPANY, A NON-INCORPORATED ASSOCIATION, DEFENDANTS

JUDGMENT

Whereas, it appears and the Court so finds:

1. That a complaint in the above entitled action was filed in the office of the County Clerk of the City and County of San Francisco in the State of California, on the 18th day of June, 1951, and that summons was issued on the same date.

2. That the defendant, International Life Insurance Company, is a corporation organized and existing under the laws of the State of Texas, and doing business in the City and County of San Francisco, and is a Non-Admitted Insurer within the meaning of the Unauthorized Insurers Process Act, California Insurance Code, Section 1610-1620.

37a 3. That summons has been duly served on said defendant in the manner prescribed in Sections 1612, 1613,

California Insurance Code, in that plaintiff caused two copies of the said complaint and summons to be delivered to and left with a person in apparent charge of the office of the Insurance Commissioner of the State of California, 1182 Market Street, San Francisco, California, on the 18th day of June, 1951.

4. That notice of such service and a copy of the process were sent within ten days thereafter by registered mail by plaintiff's attorney to the defendant International Life Insurance Company, at its last known principal place of business, and the receipt issued by the Post Office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter was addressed, and the affidavit of plaintiff's attorney showing a compliance with Sections 1612, 1613, California Insurance Code, were filed with the Clerk of this Court before the date defendant International Life Insurance Company was required to appear.

5. That the time within which the said defendant International Life Insurance Company was required to appear and plead herein has expired and it has not appeared herein and no answer or demurrer has been filed herein, and the default of said defendant has been duly and regularly entered.

6. That the Court has received evidence of the allegations of the complaint and has required the plaintiff to be examined, on oath, respecting any payments that have been made to the plaintiff or to anyone for his use, on account of any demand mentioned in the complaint.

Now, therefore, on application of the plaintiff,

It is hereby ordered, adjudged and decreed that the plaintiff recover of and from said defendant International
37b Life Insurance Company the sum of five thousand dollars ($5,000), with interest thereon at the rate of seven per cent (7%) per annum from the 2nd day of March, 1951 to the date hereof in the sum of $214.79, in all amounting to $5,214.79, together with plaintiff's costs and disbursements in the sum of $14.00.

Dated this 16th day of October, 1951.

W. T. SWEIGERT,
Judge of the Superior Court.

37c In the Superior Court of the State of California in and for the City and County of San Francisco

No. 408051

LULU B. McGEE, PLAINTIFF

v.

INTERNATIONAL LIFE INSURANCE COMPANY, A CORPORATION, ET AL., DEFENDANT

I, Martin Mongan, County Clerk of the City and County of San Francisco, and Ex-Officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify the foregoing to be full, true and correct copy of the original judgment on file and of record in my office in the above entitled cause. That the same constitutes a full and complete exemplification of the above matter in the said cause, and of the whole thereof.

All of which I have caused to be exemplified according to the Act of Congress.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 17th day of February, A. D. 1953.

[SEAL] MARTIN MONGAN,
County Clerk and Ex-Officio Clerk of the Superior Court.

I, Preston Devine, Presiding Judge of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that said Court is a Court of Record having a Clerk and Seal. That Martin Mongan who has signed the annexed attestation, is the duly appointed and qualified County Clerk of the City and County of San Francisco, and was at the time of signing said attestation, Ex-Officio Clerk of said Superior Court. That said signature is his genuine handwriting, and that all his official acts as such Clerk, are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 17th day of February A. D. 1953.

[SEAL] PRESTON DEVINE,
Presiding Judge of said Superior Court.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, Martin Mongan, County Clerk of the City and County of San Francisco, and Ex-Officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify that the Honorable Preston Devine, whose name is subscribed to the preceding Certificate, is Presiding Judge of the Superior Court of the State of California, in and for the City and County of San Francisco, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 17th day of February A. D. 1953.

[SEAL] MARTIN MONGAN,
County Clerk and Ex-Officio Clerk of the Superior Court.

38 *Excerpt from insurance policy involved*

EMPIRE NEW 4-WAY POLICY—ACCIDENT, SICKNESS, ACCIDENTAL DEATH, INCREASED SICK BENEFITS IN CASE OF DEATH—EMPIRE MUTUAL INSURANCE COMPANY—FORM 17-10M-7-46

PART XIII. NOT COVERED

(6) This policy does not cover any injury, disability, loss of life or any other loss sustained by the insured, unless sustained in the United States of America, the Dominion of Canada, or Mexico (except on any steamship as provided in Part I, and except as provided under "limitations" above, Paragraph 4), nor does it cover any loss caused or contributed to, directly, wholly or partly; by suicide or any attempt threat while sane or insane; or as a result of insanity or mental infirmity; or by injury intentionally inflicted upon the Insured by himself while sane or insane, or while or as a result of committing a

felony or assault; or from taking poison or inhaling gas, (whether voluntary or involuntarily); or while riding or driving in races; or testing an automobile on any track or speedway; or while violating any criminal law; or while intoxicated under the influence of or affected by or resulting directly or indirectly from intoxicants or narcotics; or by venereal disease or its complications; or for any injury to, or disease or ailment of the genito-urinary organs not common to both sexes; or from childbirth or pregnancy, or any complication or result of either. No indemnity shall be payable for hernia in any form, whether incurred before or after date of policy, or for injuries fatal or non-fatal (except accidental drowning) for which there shall be no visible mark or contusion or wound on the exterior of the body at the place of injury; or where internal injuries are not disclosed by an autopsy.

39 *Certified copy Unauthorized Insurers Process Act from the State of California*

Filed August 3, 1955

STATE OF CALIFORNIA

OFFICE OF THE SECRETARY OF STATE

Sacramento

FRANK M. JORDAN.
Secretary of State.

I, Frank M. Jordan, Secretary of State of the State of California, hereby certify:

That the original laws of the State of California are on file in my office pursuant to law and as the legal custodian thereof I am the proper officer to certify or authenticate copies or provisions thereof.

I further certify that on the 3rd day of June, 1949, an act of the 1949 Regular Session of the Legislature of this State was filed in my office as Chapter 495, Statutes of 1949; that said act was passed by the Assembly of said Legislature on May 13, 1949, was passed by the Senate of said Legislature on

May 19, 1949, was approved by the Governor on June 3, 1949, and is entitled:

"An act to add Article 4, comprising Sections 1610 and 1620, inclusive, to Chapter 4, Part 2, Division 1 of the Insurance Code, relating to actions in this State against nonadmitted insurers."

I further certify that the transcript hereunto annexed is a full, true and correct copy of the provisions of said act, designated therein as the "Unauthorized Insurers Process Act," and that said act became effective on the 1st day of October, 1949, and

That the provision of said act, as they appear in the annexed transcript, have been in full force and effect continuously since the date last aforesaid and are now in full force and effect.

In witness whereof, I hereunto set my hand and affix the Great Seal of the State of California this 19th day of October, 1954.

[SEAL]

FRANK M. JORDAN,
Secretary of State.

By (S) Chas. J. Hagerty,
CHAS. J. HAGERTY,
Assistant Secretary of State.

3

Chapter 495

An act to add Article 4, comprising Sections 1610 to 1620, inclusive, to Chapter 4, Part 2, Division 1 of the Insurance Code, relating to actions in this State against nonadmitted insurers

The people of the State of California do enact as follows:

SECTION 1. The purpose of this act is to subject certain insurers to the jurisdiction of courts of this State in suits by or on behalf of insured or beneficiaries under insurance contracts. The Legislature declares that it is a subject of concern that nonadmitted insurers have issued policies of insurance to residents of this State physically present herein at the time of such issuance, thus presenting to such residents the often in-

superable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies; that this State has an interest in providing to its residents a convenient forum for the purpose of asserting and enforcing legal rights under such policies; that if such residents are left to seek remedy in distant forums they will be, for practical pur-
41 poses, without remedy. In furtherance of such state interest, the Legislature herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this State, and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 29, First Session, S. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

SEC. 2. Article 4, comprising Sections 1610 to 1620, inclusive, is added to the Insurance Code, to read:

Article 4. Actions Against Nonadmitted Insurers.

1610. Any of the acts described in Section 1611, when effected in this State, by mail or otherwise, by a foreign or alien insurer which is nonadmitted at the time of the solicitation, insurance or delivery by it of contracts of insurance to residents of, or to corporations authorized to do business in, this State, is equivalent to and shall constitute an appointment by such insurer of the commissioner and his successor or successors in office to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.

1611. The acts referred to in Section 1610 are:

(1) The issuance or delivery to residents of, or to corporations authorized to do business in, this State of contracts
42 of insurance insuring (a) the lives or persons or residents of this State physically present herein at the time of such

issuance or delivery or (b) property or operations located in this State.

(2) The solicitation of applications for such contracts.

(3) The collection of premiums, membership fees, assessments or other considerations for such contracts.

(4) Any other transaction of business arising out of such contracts.

1612. Such service or process may be made by delivering to and leaving with the commissioner or some person in apparent charge of his office two copies thereof. The Commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him.

1613. Such service of process in the manner provided in Section 1612 is valid and sufficient, and gives jurisdiction over the person of such insurer, provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

1614. No plaintiff or complainant shall be entitled to a judgment by default in any such action, suit or proceeding in
43 which service of process is effected in the manner provided in Section 1612 until the expiration of 30 days from date of the filing of the affidavit of compliance.

1615. Nothing in this article contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

1616. Before any nonadmitted foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or pro-

ceeding instituted against it, such insurer shall either (1) procure a certificate of authority to transact insurance in this State; or (2) deposit with the clerk of the court in which such action, suit or proceeding is pending cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action,

1617. The court in any action, suit, or proceeding, in which service of process is effected in the manner provided in Section 1612 may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Section 1616 and to defend such action.

1618. Nothing in Section 1616 is to be construed to prevent a nonadmitted foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Section 1612 on the ground that such insurer has not done any of the acts described in Section 1611.

1619. In any action against a nonadmitted foreign or alien insurer upon a contract of insurance issued or delivered in this State to a resident thereof or to a corporation authorized
44 to do business therein, if the insurer has failed for 30 days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include such fee in any judgment that may be rendered in such action. Such fee shall not exceed 12½ percent of the amount which the court or jury finds the plaintiff is entitled to recover against the insurer, but in no event shall such fee be less than twenty-five dollars ($25). Failure of an insurer to defend any such action shall be deemed prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

SEC. 3. Section 1620 is added to the Insurance Code, to read:

1620. The provisions of the preceding sections of this article shall not apply to any action, suit or proceeding against any unauthorized foreign or alien insurer arising out of any contract

of insurance effected in accordance with Sections 1760.5 and 1763 where such contract contains a provision designating a resident of this State or any firm of which one member is a resident of this State to be its true and lawful attorney upon whom may be served all lawful process in any such action, suit or proceeding.

In any such action, suit or proceeding arising out of any such contract of insurance, the court may require the insurer to deposit cash or securities, or file bond with good and sufficient sureties, to be approved by the court, in an amount sufficient to secure the payment of any final judgment which may be rendered unless such insurer makes a showing satisfactory to the court that it maintains in a state of the United States funds or securities in trust or otherwise, sufficient and
45 available to satisfy any such final judgment and that it will pay any such judgment without requiring suit to be brought thereon in the state where such securities or funds are located.

SEC. 4. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 5. This act may be cited as the Unauthorized Insurers Process Act.

[File endorsement omitted.]

In the District Court of Harris County, Texas, 127th Judicial District

No. F418764

[Title omitted.]

Bill of exceptions

Filed Aug. 30, 1955

Be it remembered that upon the trial of the above entitled cause on the 5th day of July, A. D., 1955, then being no official court reporter present or available, Plaintiff and Defendant

agreed, with the consent and in the presence of the court, that in the event of appeal of said cause by either party to said cause, that either or both parties would be allowed to perfect written Bills of Exception to any rulings of the Court prior to the completion of the Transcript for purposes of the appeal;

Whereupon, Defendant offered into evidence certain documents comprising Plaintiff's Proff of Loss and Death, which documents included Claimant's Statement, Certificate of Death, Verdict of the Jury of Coroner's Inquest Upon
46 the Body of Lowell Franklin, and Transcript of Testimony before Coroner's Inquest Upon the Body of Lowell Franklin.

In as much as Plaintiff had theretofore agreed to make no objection to the form or authentication of such documents, Plaintiff's objection to the offer of such documents was limited to the position that these documents related to whether or not Defendant had a meritorious defense to a suit on the merits of a policy of insurance on the life of Lowell Franklin, whereas, the sole issue before the court in this cause was whether or not the California Court had jurisdiction over the Defendant to render the judgment made the basis of Plaintiff's cause herein.

And thereupon, the court sustained the objection to such evidence, to which action of the court the Defendant excepted; and Defendant excepts and tendors this Bill of Exception and asks that it be filed and signed as part of the record in this cause.

YANCY, STERRETT & MILLER,
By (S) Sam L. Sterrett, Jr.,
SAM L. STERRETT, JR.,
1821 Melrose Bldg.,
Houston 2, Texas, CApitol 2-1221.

The foregoing Bill of Exceptions having been reduced to writing by the attorney for said Defendant, and having been presented to the undersigned Judge of said Court for allowance and signature in accordance with the agreement of the parties heretofore made with the consent and in the presence of said Court, and having been by me submitted to adverse counsel and found by him to be correct and having been by me found to be correct, is hereby allowed, and approved, and ordered

filed by the clerk of this court as a part of the Record in such cause, this 30th day of August, 1955.

(S) W. SEARS McGEE,
Judge Presiding.

[File endorsement omitted.]

47. [Cost bond on appeal for $200 and filed July 25, 1955, omitted in printing.]

54 [Clerk's certificate to foregoing transcript omitted in printing.]

55 In the Court of Civil Appeals of the State of Texas

No. 12,942

LULU B. McGEE, APPELLANT

v.

INTERNATIONAL LIFE INSURANCE COMPANY, APPELLEE

APPEAL FROM DISTRICT COURT OF HARRIS COUNTY

Opinion

March 8, 1956

This suit was instituted in the District Court of Harris County by appellant, seeking to enforce, by judgment, a default judgment rendered in her favor, and against the appellee by the Superior Court of the State of California, in and for the City and County of San Francisco. This case was tried before the court without a jury upon an agreed statement of the facts, at the conclusion of which judgment was rendered in favor of appellee. This action by the court is the basis for appellant's one point of error. Both litigants agree that the sole question to be determined is whether the California court acquired jurisdiction over the person of appellee, within the due process requirement of Section 1 of the Fourteenth Amendment to the Constitution of the United States, sufficient to render the default judgment sued upon. We are of the opinion that appellant's point is not well taken and must be overruled.

The undisputed material facts are as follows: Appellee, a Texas corporation domiciled in the City of Austin, Texas, on September 1, 1948, entered into an agreement with the Empire Mutual Life Insurance Company of Arizona, an Arizona corporation, in Arizona, to reinsure the policies of insurance issued by the Arizona corporation. Among such policies was one insuring Lowell Stepp Franklin against accidental death. His mother, appellant here, was named beneficiary in the policy. Both the insured and the beneficiary were residents of California. Appellee mailed, from its home office in Austin, a reinsurance certificate to Lowell Stepp Franklin. Thereafter premium notices were mailed by appellee from its home office,
to the policyholder in California by United States mail,
56 and premium payments were mailed by the policy-
California and received by appellee in Texas. The parties have stipulated that neither before nor after September 1, 1948, did Empire Mutual Life Insurance Company of Arizona, or appellee herein maintain an office of any nature whatsoever in the State of California; nor did either of such companies have or maintain an agent or sales personnel in California; nor did either of such companies actually appoint any officer of the State of California as an agent of any nature for service of citation or for any other purpose; nor has either of such companies, or any agents or employees of either company, ever been served, within the State of California, with summons and complaint in any court proceeding. The stipulation is silent as to any business activity within the State of California carried on by either company, except as above set forth. Lowell Stepp Franklin died in California on December 1, 1950. Appellant made claim against appellee for the proceeds of the policy. This claim was refused by appellee for reasons not here material. Appellant instituted suit in the California court, and complied with the provisions of an act of the California Legislature entitled the Unauthorized Insurer's Process Act. After service as provided for in that act, and default on the part of appellee, judgment favorable to appellant was rendered by the California court on October 16, 1951. It is upon that judgment that the present suit is based.

The California "Unauthorized Insurer's Process Act" became effective on the 1st day of October, 1949. The provisions of the act which are material to this litigation are contained in Sections 1610 to 1613, inclusive, and are as follows:

"1610. Any of the acts described in Section 1611, when effected in this State, by mail or otherwise, by a foreign or alien insurer which is nonadmitted at the time of the solicitation, insurance or delivery by it of contracts of insurance to residents of, or to corporations authorized to do business in, this state,
is equivalent to and shall constitute an appointment by
57 such insurer of the commissioner and his successor or
successors in office to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.

"1611. The acts referred to in Section 1610 are:

"(1) The issuance or delivery to residents of, or to corporations authorized to do business in, this State of contracts of insurance insuring (a) the lives or persons or residents of this State physically present herein at the time of such issuance or delivery or (b) property or operations located in this State.

"(2) The solicitation of applications for such contracts.

"(3) The collection of premiums, membership fees, assessments or other considerations for such contracts.

"(4) Any other transaction of business arising out of such contracts.

"1612. Such service of process may be made by delivering to and leaving with the commissioner or some person in apparent charge of his office two copies thereof. The Commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him.

"1613. Such service of process in the manner provided in Section 1612 is valid and sufficient, and gives jurisdiction over

the person of such insurer, provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the
58 letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow."

No contention is made that appellant did not comply with the applicable requirements of the California Act. The sole question is whether that compliance constitutes due process when applied to the undisputed facts in this record.

It should be noted that the policy sued on in the California court was in force prior to the effective date of the "Unauthorized Insurer's Process Act" of that State. We note that fact because it has been held to be determinative of the rights of the litigants in the only authorities to which our attention has been directed, wherein, in similar litigation, the validity of process obtained under the provisions of similar legislative enactments has been the subject of judicial decision.

In the case of Parmalee v. Iowa State Traveling Men's Association, 206 Fed. 2d 518 (CCA 5th Circuit), the court had under consideration the Florida Unauthorized Insurer's Process Act, which is similar, in all material respects, to the California statute here involved. The court's conclusions as to the controlling effect of the fact which we have noted above is disclosed by the following language from the opinion: "Furthermore, as a regulatory law it plainly can be given no effect which will impose, retroactively, the provisions of the statute upon unauthorized insurers having policies in force prior to the enactment of the statute. These distinctions are not hypothetical, but are substantial, in the proper application of the statute. They mark the line between due process and unauthorized state action."

In Parmalee v. Commercial Travelers Mut. Acc. Ass'n of

America, 206 Fed. 2d 523 (CCA 5th Circuit), the following language is employed: "Under our ruling in Parmalee
59 v. Iowa State Traveling Men's Association, 5 Cir., 206 F. 2d 518, the certificate not being delivered in Florida to a Florida resident, subsequent to the effective date of the Florida statute referred to, the suit to enforce it does not come within the provisions of the statute. Accordingly, the order of the trial court quashing the service of process because not authorized by the statute, though based upon other grounds which we do not examine, nevertheless accomplished a correct result. No reversible error appears."

Again, in Berg v. Commercial Travelers Mutual Accident Association of America, Utica, New York, 207 Fed. 2d 775, the same court uses the following language: "The material facts in this case are the same in substance as those in Parmalee v. Commercial Travelers Mutual Accident Association of America, 5 Cir., 206 F. 2d 523 decided Aug. 6, 1953.

"The judgment appealed from is, therefore, affirmed on the authority of that case."

Appellant attacks the rationale of the decision of the CCA 5th Circuit upon the proposition that that court erroneously designated the statute there involved as a "regulatory law" whereas it is a "procedural" law. Whatever that court may have designated the statute, there can be no doubt but that the court was concerned with the question of due process. And further, there can be no doubt but that under analogous factual situations, that court has thrice held compliance with similar statutes not to constitute due process. We rest our decision of the present case upon that authority.

We do not consider Travelers Health Ass'n v. Commonwealth of Virginia, 70 S. Ct. 927, relied upon by appellant, to be either factually analogous to, or legally applicable to the present case. That case was a proceeding by the Commonwealth of Virginia at the relation of the State Corporation Commission. The Commission entered a cease and desist order enjoining the Travelers Health Ass'n from doing certain acts without a permit or authorization from the Commission.
60 The Supreme Court of Virginia upheld the order of the Commission. Jurisdiction over the person of the Trav-

elers Health Ass'n was obtained, both by the Commission and the court by service by registered mail under the provisions of a statute similar in its operative effect to the California statute here involved. The United States Supreme Court had before it the Constitutional question of whether such service violated the requirement of due process. Mr. Justice Black wrote the court's opinion upholding the jurisdiction of the Virginia Court. Four members of the court concurred in the opinion and four dissented therefrom. Among those concurring was Mr. Justice Douglas, who wrote a separate concurring opinion. In it, he used the following language: "Since the formula adopted by the Court is adequate to dispose of this case, I have joined in the opinion. But I feel that the type of problem presented requires a more selective treatment. Hence my separate opinion.

"* * *.

"The requirements of due process do not, in my opinion, preclude the extension of Virginia's regulatory scheme to appellant. I put to one side the case where a policyholder seeks to sue the out-of-state company in Virginia. His ability to sue is not necessarily the measure of Virginia's power to regulate, * * *."

Four members of the court joined in a dissenting opinion written by Mr. Justice Minton, wherein the following language is employed: "An in personam judgment cannot be based upon service by registered letter on a nonresident corporation or a natural person, neither of whom has ever been within the State of Virginia. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Old Wayne Mutual Life Ass'n of Indianapolis, Ind. v. McDonough, 204 U. S. 8, 22–23, 27 S. Ct. 236, 240, 241, 51 L. Ed. 345. * * *.

"Service by registered mail is said by the majority to be sufficient where the corporation has 'Minimum contacts' with the state of the forum. How many 'contacts' a corporation or person must have before being subjected to suit we are not informed. Here all of appellants' contacts with the residents of Virginia were by mail. No agent of appellant cor-
61 poration has entered the State, nor has the individual appellant. The contracts were made wholly in Nebraska.

Under these circumstances, I would hold that appellants were never 'present' in Virginia."

In view of the division between the members of the court, the opinion of Mr. Justice Black became the opinion of the United States Supreme Court only because of the concurrence therein of Mr. Justice Douglas. In view of the limitation placed on his concurrence by Mr. Justice Douglas, and the views expressed in the dissenting optinion, the case of Travelers Health Ass'n v. Commonwealth of Virginia is not, in our opinion, any authority for the proposition that the requirement of due process has been met in this present case.

We are of the opinion that the Superior Court of California obtained no jurisdiction over the person of the appellant herein to render the default judgment upon which this present suit is based. We, therefore, affirm the judgment of the trial court.

(S) W. P. HAMBLEN, Jr.
Chief Justice.

[File endorsement omitted.]

62 In the Court of Civil Appeals of the State of Texas

No. 12,942

LULU B. McGEE, APPELLANT

v.

INTERNATIONAL LIFE INSURANCE COMPANY, APPELLEE

From District Court of Harris County, Tr. Ct. #418,764, Opinion by Hamblen, C. J.

Judgment

March 8, 1956

This cause, being an appeal from the judgment rendered and entered by the court below on July 11, 1955, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be

in all things affirmed; that the appellant, Lulu B. McGee, and her surety, Fidelity & Deposit Co. of Maryland, pay all costs incurred by reason of this appeal and all such trial court costs as were therein adjudged against the said appellant. It is further ordered that this decision be certified below for observance.

[Clerk's certificate to foregoing paper omitted in printing.]

65 In the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston, Texas

Appellant's motion for rehearing

Filed March 21, 1956

To the Honorable Court of Civil Appeals:

Now comes Appellant in the above numbered and entitled cause, and respectfully moves the Court to set aside the judgment of this Court, rendered on March 8, 1956, affirming the Trial Court's judgment, and to grant her a rehearing and reverse the judgment of the Trial Court, and therefor says:

1

The Court of Civil Appeals erred in failing to hold that a Court, by proper service of process, may acquire jurisdiction over an individual not domiciled within the state, who does acts or owns things in a state, as to causes of action arising out of such acts or such ownership, if a statute of the state so provides at the time when the cause of action arises, without doing violence to Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

66 2

The Court of Civil Appeals erred in holding that the imposition of the service of process provisions of the Unauthorized Insurers' Process Act of California by the California Court

on an unauthorized insurer as to a suit on a policy of insurance issued prior to the effective date of the California Unauthorized Insurers' Process Act violated the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

3

The Court of Civil Appeals erred in holding that Travelers Health Association vs. Commonwealth of Virginia, 70 S. Ct. 927, decided by the United States Supreme Court, is not applicable to the facts in this case.

4

The Court of Civil Appeals erred in failing to follow the opinion of the United States Supreme Court in Travelers Health Association vs. Commonwealth of Virginia, 70 S. Ct. 927.

5

The Court of Civil Appeals erred in following the opinions of the Circuit Court of Appeals for the Fifth Circuit in Parmalee vs. Iowa State Traveling Men's Association, 206 Fed. 2d 518; Parmalee vs. Commercial Travelers Mutual Accident Association of America, 206 Fed. 2d 523; Berg vs. Commercial Travelers Mutual Accident Association of America, Utica, New York, 207 Fed. 2d 775.

6

The Court of Civil Appeals erred in holding that the Unauthorized Insurers' Process Act of California can be given no effect which will impose, retroactively, the provision of that statute upon unauthorized insurers as to suits on policies in force prior to the effective date of the California Unauthorized Insurers' Process Act without violating the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

Wherefore, Appellant respectfully prays that this Motion be granted, and that the judgment of the Trial Court be in all things reversed and the case rendered.

67 Respectfully submitted.

By (S) Herman Wright,
HERMAN WRIGHT,
200 Republic Building, Houston 2, Texas,
Attorneys for Appellant.

Copies of this motion for rehearing have been delivered to Messrs. Yancy, Sterrett & Miller, 1821 Melrose Building, Houston, Texas, and to Messrs. Hornsby, Kirk & Johnson, P. O. Box 1058, Austin, Texas, Attorneys for Appellee.

(S) HERMAN WRIGHT.

[File endorsement omitted.]

In the Court of Civil Appeals of the State of Texas

Order denying motion for rehearing

March 29, 1956

It is ordered that appellant's motion for rehearing be refused.

68 [File endorsement omitted.]

68a In the Supreme Court of Texas

LULU B. McGEE, PETITIONER

v.

INTERNATIONAL LIFE INSURANCE COMPANY, RESPONDENT

Application for writ of error

Filed May 4, 1956

To the Honorable Supreme Court of Texas:

Your Petitioner, Lulu B. McGee, respectfully applies for a Writ of Error to issue to the Honorable Court of Civil Appeals

for the First Supreme Judicial District of Texas, at Galveston, in Cause No. 12,942, styled Lulu B. McGee, Appellant, vs. International Life Insurance Company, Appellee, pending in said Court, for the purpose of reviewing the Judgment of that Court with respect to errors hereinafter assigned.

Statement of the Case

This is a suit on a final judgment obtained in a California Court, the California suit being one upon an insurance
68b policy and being in an amount in excess of $1,000. The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, but incorrectly states the law.

Jurisdiction of the Supreme Court

The Supreme Court has jurisdiction of this suit under subdivisions 3 and 6 of Article 1728, Vernon's Civil Statutes of the State of Texas Annotated.

The only question here is whether or not the California judgment is void for want of jurisdiction in the California Court. It can only be void if the provisions of the California Unauthorized Insurers' Process Act, as applied here, are unconstitutional under Section 1 of the Fourteenth Amendment of the Constitution of the United States of America.

First Point of Error

(Germane to Assignments of Error One Through Six, Appellant's Motion for Rehearing)

Failing to hold that a court by proper service of process may acquire jurisdiction over an individual not domiciled within the state who does acts or owns things in a State as to causes of action arising out of such acts or such ownership, if a statute of the State so provides at the time when the cause of action arises without doing violence to Section One of the fourteenth amendment to the Constitution of the United States of America.

STATEMENT UNDER FIRST POINT OF ERROR

Regulation of the "Mail-Order" insurance business has long been a legislative problem in the various states.

68c The National Association of Insurance Commissioners, an organization of public officials in the various states, whose jobs are to oversee and regulate the insurance business, sponsored the passage of a uniform Unauthorized Insurers' Process Act. With only slight variations in the text, thirty-eight (38) of the forty-eight (48) states have now adopted this Unauthorized Insurers' Process Act, both California and Texas being among the thirty-eight (38) states. The California Act is shown in the Transcript at pages 37 through 43. The Texas Unauthorized Insurers' Process Act is found in Title 14, Article 21.38, Secs. 5 and 6 of Vernon's Civil Statutes of the State of Texas Annotated.

The basic authority for the constitutionality of the type of service of process here involved is found in Virginia v. Travelers Health Association, 339 U. S. 643, 70 S. C. 927, Decided by the United States Supreme Court in 1950.

In the Travelers Health Association case, the fact situation was strictly one of "Mail-Order" insurance business conducted by mail between the Nebraska home office of the insurance company and citizens of Virginia, and vice-versa. Except for this activity, the Travelers Health Association was not "present" in Virginia and was not "doing business" in Virginia. The service of process method employed by Virginia, as is here the case, was upon the Secretary of the Commonwealth of Virginia who, in turn, served the Travelers Health Association with process by registered mail. It was the contention

68d of the Travelers Health Association that under these facts, Virginia had no "power" to reach it under Section One of the Fourteenth Amendment to the Constitution of The United States of America. With this contention, the United States Supreme Court disagreed. In doing so, among other things, the Court said:

"* * * where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'con-

sent' in order to sustain the jurisdiction of regulatory agencies in the latter state * * * (p. 929).

"* * * And in International Shoe Company v. State of Washington, 326 U. S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 161 A. L. R. 1057, this Court, after reviewing past cases concluded: 'Due process requires only that in order to subject a Defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice".'

"'Measured by the principles of the Osborn, Hoopeston & International Shoe Cases, the contacts and ties of appellants with Virginia residents, together with that state's interest in faithful observance of the certificate obligations, justifies subjecting appellants to cease and desist proceedings under paragraph 6. * * *

"Moreover, if Virginia is without power to require this association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificate holders might be Nebraska. Health benefit claims are seldom so large that Virginia policy holders could afford the expense and trouble of a Nebraska lawsuit. In addition suits on alleged losses can be more conveniently tried in Virgina where witnesses would more likely live and where claims for losses would presumedly be investigated * * *. And prior decisions of this court have referred to the unwisdom, unfairness and injustice of permitting policy holders to seek redress only in some distant state where the insurer is incorporated. The due process clause does not forbid a state to protect its citizens from such injustice (p. 930)."

68e

However, the Galveston Court of Civil Appeals contends that this case is neither "factually analogous to, or legally applicable to the present case.". In so holding, the Galveston Court seized upon this language in the concurring opinion of Justice Douglas (339 U. S. at p. 644):

"Since the formula adopted by the Court is adequate to dispose of this case, *I have joined in the opinion.*

Clearly, the majority opinion by Justice Black is "factually analogous to" and "legally applicable to the present case." The question then revolves around the concurring opinion of Justice Douglas. It seems clear that while Justice Douglas agreed with Justice Black's opinion, he felt Virginia's power to regulate required far less "minimum contacts," than he thought Justice Black's opinion was requiring, for he said:

"The requirements of due process do not, in my opinion, preclude the existence of Virginia's regulatory scheme to Appellant. I put to one side the case where a policy holder seeks to sue the out-of-state company in Virginia. *His ability to sue is not necessarily the measure of Virginia's power to regulate.*"

"Whether such solicitation is isolated or continuous, it is activity which Virginia can regulate."

Only three cases, so far as we have been able to determine, have been decided by appellate courts where the constitutionality of these Unauthorized Insurers' Process Acts are involved.

68f All three cases come from the Court of Appeals for the Fifth Circuit. Parmalee v. Iowa State Traveling Men's Association, 206 F. 2d 518 and Parmalee vs. Commercial Travelers Mutual Accident Association, 206 F. 2d 523, and Berg v. Commercial Mutual Accident Association of America, 207 F. 2d 775. Unfortunately, in none of these cases did the Fifth Circuit Court have the benefit of State Court construction or reasoning. For this reason alone, if for none other, we do not consider these opinions to be binding or of much weight here.

In the Iowa State Traveling Men's Association Case, the Court actually wrote for all three cases; therefore, we shall concern ourselves only with that case.

While holding the Unauthorized Insurers' Process Acts constitutional, the Court very narrowly construed the statute.

It held first that "We construe the legislation to apply only to policies of insurance delivered in Florida to Florida residents." While we are not in entire agreement, we need not quarrel here with this proposition since we have a policy of insurance "delivered" in California to a California "resident."

Next, the court sought to construe the act to apply only to suits "arising out of any such contract of insurance." Such a construction is not readily apparent from the language of the statute, and the courts realized this, saying:

"While the statute refers to *'any of the following acts'* we understand it to mean rather the doing of any of the proscribed acts *from which results the issuance or delivery of a con-*
68g *tract of insurance in the state.* The force of the statute is directed to suits upon such contracts. However, for the purposes of Section Three of the Act, *each act may have a consequence of providing means of service of process,* but then also only as to suits upon contracts delivered in Florida to Florida residents. However this may be, in the present case each and every requirement of the statute is met."

Not only does it appear that the court was indecisive about this unnecessary construction, but, it appears, the court relied only indirectly upon it in deciding the second of the Parmalee cases. Actually, this construction as well as the other one discussed above has the effect of literally destroying the intended purpose of the act. But, again, for our purposes here, we need not quarrel since we have service of process based on a completed policy delivered in California to a California resident.

Finally, the court said:

"As a regulatory law it plainly can be given no effect which will impose retroactively, the provisions of the statute upon unauthorized insurers having policies in force prior to the enactment of the statute. The distinctions are not hypothetical, but are substantial in the proper application of the statute. *They mark the line between due process and unauthorized state action."*

It is with this language that we must be concerned here since it is the only test laid down by the Fifth Circuit which our case does not meet, and since the court below felt obligated to adopt this reasoning of the Fifth Circuit.

The original policy issued by Empire Mutual Insur-
68h ance Company to the deceased was issued April 1, 1944. The policy was re-insured by the Respondent on Sep-

tember 1, 1948. The California Unauthorized Insurers' Process Act became effective October 1, 1949. Lowell Stepp Franklin died December 11, 1950. It is clear that this policy by this unauthorized insurer was in force prior to the effective date of the California Unauthorized Insurers' Process Act.

The first error into which the Court fell in this last proposition is in designating the act as a "Regulatory Law." The act is wholly procedural, dealing only with process, the service of it, and the method of defense in such a case.

No one has a constitutional, or vested right not to be sued. His only constitutional right, as the United States Supreme Court said in the Travelers Health Association case, supra, is: "Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contact with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." The only constitutional question involved in the process and service of it under the Unauthorized Insurers' Process Act was laid to rest by the Travelers Health Association case, supra.

"Statutes relating to service of process, as for example, providing a new or more convenient method of service, * * * relate to a mere matter of procedure, and therefore do not disturb vested rights." 16 C. J. S. 683, para. 263.

68i "The parties to a suit have no vested right in the rules of practice or modes of procedure prescribed by the laws in force when a suit is brought, but being remedial only such rules may be amended, altered, or repealed, or others substituted in their place, at any time before a final trial; or at least before vested rights have been acquired under them * * * unless provided otherwise by the act itself, the new statute governs all proceedings had thereafter, including those in actions that have accrued and are pending at the time of its passage." 16 C. J. S. 682, para. 261.

"Legislation designed to enforce performance of a contract executed prior to the enactment of the legislation does not impair the obligation of contract.

"It is well settled, even where retroactive laws are the subject of express constitutional inhibition, that retroactive laws

which affect only remedies or procedure, as distinguished from those affecting substantial rights are valid, provided the changes made are reasonable and do not disturb vested rights or impair contractual obligations; and that there are no special constitutional restrictions, and such statutes are valid even in their application to pending suits or appeals * * *

"Accordingly, statutes may be valid which retroactively affect matters of practice generally, venue, *process*, parties, defenses, evidence, judgment, costs and review * * *." 16 C. J. S. 865, para. 418.

This principle is particularly well stated in City of Buffalo v. Hawks, 236 N. Y. 89, 226 App. Div. 480 affd. 168 N. E. 438, 251 N. Y. 588, as follows:

"The guarantee of the constitution was never intended to perpetuate any particular method of bringing a party into court. So long as his substantial rights are preserved, the Legislature may make such changes in the manner of service of the process of the Courts as it deems proper." (p. 94)

68j See also King v. Security Co. of Pottstown, 88 Atl. 789, 241 Pa. 547, where the court said:

"'No person has a vested right in any course of procedure, * * * he has only the right of prosecution or defense in the manner prescribed, for the time being, by or for the court in which he sues; and, if a statute alters that mode of procedure, he has no other right than to proceed according to the altered mode. *The remedy does not alter the contract or the tort; it takes away no vested right.*' Enderlich on Interpretation of Statutes, 285. Another statement of the principle is this; '*Statutes which are designed to change the mode of judicial procedure, where such change relates to the method of enforcing a right and does not alter the right itself are construed to apply to causes of action which accrued before enactment as well as those to accrue thereafter.*' 26 Am. Eng. Ency. Law (2d Ed.) 695. The purpose of this statute was purely remedial. *It affected in no way any vested right of the defendant. It is in substance merely an extension to those wishing to bring suits against surety companies of the same convenient provisions for service that have been available*

for years in bringing suits in the county where the liability arises in fire, life and accident insurance companies." (p. 791)

In McCoy v. Hunter, 120 So. 767, the Louisiana Court said:

"It is also argued by the Defendant Hunter that Act 57 of 1926, providing for service on the surviving spouse is not applicable to the proceedings had by executory process, because *the mortgage was granted and the mortgagor died before the act became effective*, and therefore to hold that the act is applicable to the foreclosure of the mortgage would give to the act a retroactive affect. * * * The act is remedial and applied to the foreclosure of mortgages executed prior to its passage as well as to those executed after it became effective * * * the fact that the act applies to mortgages executed before its passage and in that sense is retroactive does not make it unconstitutional for the act is remedial." (p. 769)

68k In the California case of Lincoln v. Superior Court, 39 P. (2) 405, 2 Cal. (2) 127, the plaintiff was a beneficiary under a trust deed. This was a suit to foreclose the deed. When the deed was executed, generally speaking, there was no right of foreclosure existing under the law of California. Before the bringing of this suit, however, a right of foreclosure was created by legislation. The Court in holding the statute constitutional said:

"The section is a remedial statute which merely affords a new and additional means of enforcing a right. The cases distinguish between laws which impair the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made. Bernheimer vs. Converse, 206 U. S. 516, 530, 27 S. Ct. 755, 51 L. Ed. 1163. *The obligation of a contract has reference alone to the rights of the parties arising thereunder and not to any remedy for their enforcement. A remedy afforded by a statute passed subsequent to the execution date of the contract may be envoked by a party to the contract who has been wronged by its nonperformance. In other words, one who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legislation that is designed only to enforce performance of his obligation.* Such legislation does not impair the obligation of the contract and is constitutional.

Wilson vs. Standifer, 184 U. S. 399, 410, 22 S. Ct. 384, 46 L. Ed. 612; New Orleans C. & L. Ry. Co. v. Louisiana, 157 U. S. 219, 15 S. Ct. 581, 39 L. Ed. 679; Aikins vs. Kinsbury, 170 Cal. 674, 678–681, 151 P. 145; Colma Veg. Ass'n. vs. Benetti, 91 Cal. App. 103, 112, 267 P. 172; Maguire vs. Cunningham, 64 Cal. App. 536, 551–553, 222 p. 838.

"That Sec. 728a, Supra, is purely remedial does not admit of doubt, as it affords, as stated above, merely a new and additional means of enforcing an existing right. The
681 *respective rights of the trustor and beneficiary are neither increased nor diminished by the section. It does not enlarge the obligation of the trustor, but only enables the trustee or beneficiary to compel the performance of that obligation."*

In United States v. Resch, 85 F. Supp. 389, this rule was applied to a slightly more delicate situation. The statute involved was the Housing and Rent Act of 1947. Prior to 1949 only the tenant had the right to sue for treble damages for violation of the act. The alleged violation occurred while the act so stated, that is prior to 1949. In 1949 the act was amended to permit the government to institute suit for treble damages if the tenant failed to do so for thirty (30) days. In holding the amendment constitutional:

"That amendment to Sec. 205 of the Housing & Rent Act of 1947 created a remedy in favor of the Government which it did not have under the 1947 Act. However, the same remedy was previous to the 1949 amendment available to the tenant by virtue of a 1948 amendment. No new penalty was created. The damages formerly recoverable by the tenant were not increased and the remedy given to the government was predicated on the failure of the tenant to bring his suit within a given time.

"Congress or a state legislature may pass retroactive laws such as in their operation may affect pending suits and give to a party a remedy which he did not previously possess, or modify an existing remedy or remove an impediment in the way of legal proceedings. Landy v. United States, 6 Cir., 108 F. 2d 698, 705, cert. den., 309 U. S. 681, 60 S. Ct. 721, 84 L. Ed. 124.

"Martini v. Porter, 9 Cir., 157 F. 2d 35, 40, cert. den., 330 U. S. 848, 67 S. Ct. 1091, 91 L. Ed., 606, the Court said: 'The fact that the order has a retroactive affect does not necessarily make it invalid.' Compare Paramino Lumber Co. v. Marshall, 309 U. S. 370, 60 S. Ct. 600, 84 L. Ed. 814 68m * * * *No vested right of appellant's was disturbed for 'there is no such thing as a vested right to do wrong.'* See also Bowles vs. Strickland, 5 Cir., 151 F. 2d 419 and Bowles v. Miller, 10 Cir., 151 F. 2d 992."

Texas also follows this distinction between "remedial" and "substantive" matters. Of particular interest is the case of New Amsterdam Casualty Co. v. Patton, 22 S. W. (2d) 540, 36 S. W. (2d) 1000, by the Commission of Appeals. In that case an amendment to the Workmen's Compensation Law was involved. On November 2, 1926, Patton was injured in the course of his employment. A final award was rendered by the Industrial Accident Board on March 28, 1928. Prior to June, 1927, the Workmen's Compensation Act required Notice of Appeal from a Board award to be given both to the Industrial Accident Board and the adverse party. By an amendment, effective in June, 1927, the Act was changed so as to require Notice of Appeal to be given only to the Industrial Accident Board. The compensation carrier, desiring to appeal from the March 28, 1928, Board award, gave Notice of Appeal only to the Industrial Accident Board. Thereafter, on May 4, 1928, the compensation carrier filed its suit to set aside the Board award. Patton contended that to apply the 1927 amendment to his claim was to give the amendment a retroactive effect. The Galveston Court of Civil Appeals, in holding against Patton, said in part:

"* * * while the giving of such a notice is undoubtedly a jurisdictional element (Texas Employers Insurance Ass'n. v. Fussell (Tex. Civ. App.) 1 S. W. 2d 404), it is also essentially procedural and remedial in its nature, pertaining 68n only to the manner in which an award may be taken on into the courts, and not having to do with any substantive or vested rights of the adverse party; its administration in the courts, therefore, seems to us to fall within the rule applied by that class of cases holding that a mere remedy,

either in or outside of the courthouse, that does not impair the obligations of a contract or other vested right may be changed at the will of the legislature without legally aggrieving any party affected thereby (Life Insurance Co. vs. Wolters (Tex. Com. App.) 10 S. W. 2d 698, Oldum v. Garner, 86 Tex. 374, 25 S. W. 181 * * *

"The amendment by the Fortieth Legislature in this instance took away no right from the appellee except the mere privilege of being directly served with a notice that the casualty company would not abide by the award as ending the controversy; his compensation rate was not affected, neither was his right of recovery nor status in any other substantive respective respect altered in any way; the single change made was in the manner in which his adversary might perfect its resort to the courts from an award unfavorable to it."

The Commission of Appeals, in affirming the Galveston Court said:

"The legal relation which arises between the employee, the employer and the insurer, who bring themselves within the scope of operation of the Workmen's Compensation Statutes, is contractual. * * * By implication, the statutes then existing become part of the contract. This in a sense, includes the provisions of the statutes which deal with the matter of remedy. The law, however, does not imply a purpose on the part of the parties to make such remedial provisions a part of the 'obligation' of the contract. *In presuming that the parties entered into the contractual relation in contemplation of the remedies afforded by the statutes, the law further presumes that the power of the legislature to substitute other remedies was contemplated. Consequently, subsequent legislation which effects a change in this respect, is not rendered invalid as to said parties, by the constitutional provision against the impairment of the obligations of contracts, if an adequate remedy is left available.* Farmers Life Insurance Company v. Wolters (Tex. Com. App.) 10 S. W. 2d 698."

680 In other Texas cases, this general proposition is recognized.

In Tucker, et al. v. Cole, et al., 215 S. W. 252, the Court said:

"The Legislature has the undoubted power to change judicial methods and remedies for the enforcement of contracts so long as they do not impair, as here, the obligation of contracts."

See also Sgitcovich v. Sgitcovich, 241 S. W. 2d 142, where the Texas Supreme Court said:

"The general rule is that the Legislature in its discretion may prescribe what notice shall be given to a defendant in a suit, subject to the condition that the notice prescribed must conform to the requirements of due process. The requirement of due process of law is met if the notice prescribed affords the party a fair opportunity to appear and defend his interests. 12 C. J. 1230; Mabee v. McDonald, 107 Tex. 139, 175 S. W. 676; Mexia Independent School District v. City of Mexia, 134 Tex. 95, 133 S. W. 2d 118 * * *"

The restatement of Judgments, Sec. 23 provides:

"A Court by proper service of process may acquire jurisdiction over an individual not domiciled within the State who does acts or owns things in a state which are of a sort dangerous to life or property, as to causes of action arising out of such acts or such ownership, *if a statute of the state so provides at the time the cause of action arises.* * *

"Comment (a): *The Rule stated in this section is not applicable if at the time when the cause of action arose there was no statute in the state providing for the acquiring of jurisdiction over the defendant.*"

We deem it of considerable significance that the condition given in the Restatement of Judgments is that the
68p statute of the state exist at the time the cause of action arises. Clearly, it is not contemplated, as the Fifth Circuit indicated, that the existence of the statute must predate the existence of the policy of insurance. To follow the logic of the Fifth Circuit is to destroy the time-honored distinction between matters of "remedy" and matters of "substance."

We think the second error of the Fifth Circuit Court in the Parmalee case, in saying that the effective date of the statute must pre-date the policy, was that it failed, even under its reasoning, to take into account the conduct of the unauthor-

ized insurer between 1949, the effective date of the statute, and 1951, the date of the insured's death. So far as the facts disclose, we may assume that the insurance company, after 1949, continued in the course of its mail-order business in Florida. Certainly, it continued its dealings with the insured after the effective date of the act, and after it was aware, or should have been aware of the existence of the act, and the consequences to it of continuing its mail-order insurance business in that state.

In this situation, we are impressed with the reasoning of the New Jersey Federal District Court in Boches v. Miami Airline, 111 F. Sup. 133. In that case, a New Jersey statute made the Secretary of State the service agent for non-domiciled corporations operating aircraft over New Jersey as to civil cases "arising out of or by reason of any accident or collision occurring on or over the land or waters or in the air space of this State." That statute became effective May 16,
68q 1952. The accident causing the injuries complained of occurred December 16, 1951. Service was had on the defendant November 21, 1952. Holding the application of the statute constitutional in that situation, the court said:

"The cases cited and the Restatement would seem to be determinative of this motion. But comparison of the case at Bar with these authorities shows a rational of differentiation. Since the passage of the act above referred to, the defendant company, which previous to its passage had done business in New Jersey, has continued to carry on its aircraft operations in the State. *The question arises as to whether by such continuance the defendant may be considered to have consented to accept process through service on the Secretary of State in causes of action arising prior to May 16, 1952,* the effective date of N. J. S. A. 6: 5–3. None of the cited authorities deals with this particular problem, nor has it been directly treated by the Restatement of Judgments. These would seem to apply to situations where a single act resulting in injury is casually performed, as distinguished from acts performed by those doing business in the State. *It is the court's considered opinion that the defendant's continued operation in the state after May 16, 1952, rendered it amanable to process*

under N. J. S. A. 6: 5–3 for causes of action arising before this date but while it was doing business in the state.

"Defendant argues that to uphold this service would affect its vested rights. *It is hard to imagine however how there can be a vested right not to be served. Service of process is itself a matter of adjective law, since it relates to and deals with the mechanics of practice and procedure, the legal machinery by which the substantive law is made effective.* 72 C. J. S., process, para. 25. *It deals with remedial rights, the means given for enforcing a claim, or the process and machinery by which the facts are made known to the court.* Goodrich, conflict of laws, 2d Ed., pp. 188, 189. * * *

"Defendant then had no vested right not to be served since service, itself, is by its nature procedural and may be changed by the sovereign whose duty it is to determine such procedure."

68r In the case at hand, we do not need to go so far as the Boches case goes since clearly the cause of action here arose after the effective date of the California Statute. But, certainly, it is logical to say that where an insurance company continues doing that which it knows will subject it to service of process if and when a cause of action arises under its policies, it has "consented" to place, or voluntarily placed itself under the act. In truth, the language of the act notifies such companies that to continue doing any of these acts, by mail or otherwise: (1) issuance or delivery of a policy of insurance, (2) solicitation, (3) collection of premiums, or (4) "any other transaction of business arising out of such contracts," will subject them to service of process in suits brought in the state.

Like the New Jersey Court, service of process being procedural only, we think in our case, the Respondent, by continuing its activities in California from October 1, 1949, the effective date of the California Act, to December 11, 1950, the date of Franklin's death, voluntarily and knowingly subjected itself to the terms of the California Unauthorized Insurers' Process Act.

CONCLUSION

Wherefore, Petitioner prays that upon consideration of this application Writ of Error be granted, and that upon final hearing, the judgment of the district court and the
68s Court of Civil Appeals be reversed and judgment rendered for Petitioner.

Respectfully submitted.

MANDELL & WRIGHT,
By HERMAN WRIGHT,
Attorneys for Petitioner,
200 Republic Building, Houston 2, Texas.

Of counsel:
HERMAN WRIGHT.

Proof of service (omitted in printing).

[Clerk's certificate to foregoing paper omitted in printing.]

68t No. A-5830

* * * * * *

In the Supreme Court of Texas

* * * * *

[Title omitted.]

Answer to application for writ of error

To the Honorable Supreme Court of Texas:

The respondent, International Life Insurance Company, respectfully files this, its Answer to the Application for Writ of Error heretofore filed by Lulu B. McGee, Petitioner.

STATEMENT OF THE CASE

While the opinon of the Court of Civil Appeals has correctly stated the general nature and result of the suit, some supplementation seems desirable.

68u The case was tried upon a stipulation of facts. The Court of Civil Appeals, after setting forth some of the undisputed facts, states:

"The stipulation is silent as to any business activity within the State of California carried on by either company except as above set forth."

It is submitted that it was affirmatively stipulated that neither this respondent nor the company issuing the original policy, which was reinsured by respondent, had in any way carried on any business activity within the State of California except as expressly set out in the stipulation of facts. (Tr. p. 24—the last clause of numbered paragraph XV.)

Respondent was not attempting to carry on a "mail order" business in California as petitioner seeks to imply.

There are no facts in the instant case showing anything more than the one isolated transaction which respondent entered into only because it was obligated to do so under a contract already made prior to the passage of the California Unauthorized Insurers' Process Act. There was no systematic and wide delivery of appellee's policies in California based on solicitations in California.

Appellee pled (Tr. pp. 11–12), and offered to prove (Tr. pp. 43–44), that the proofs of loss and death furnished by petitioner showed that the insured committed suicide while committing an assault on two officers of the law and while he was an inmate of a hospital of the mentally insane and that the coroner's jury verdict based upon uncontradicted evidence, established such facts. The policy sued upon expressly
68v provided that it did not cover any loss of life caused or contributed to by suicide while sane or insane or as a result of committing a felony or assault (Tr. p. 27).

The undisputed record shows that the only contacts respondent, the Texas corporation, had with California were that it entered into an agreement with an Arizona corporation to reinsure the policies issued by the Arizona corporation including the one sued upon; that, as required by respondent's agreement with the Arizona corporation, respondent mailed from its home office in Austin, Texas, a reinsurance certificate to the involved insured in California; that thereafter, premium notices were mailed by respondent from Texas to California and premiums were mailed by the insured in California and received by respondent in Texas; and that after the death of

the insured in California, petitioner, as beneficiary, furnished proofs of death which were duly considered by respondent and thereafter respondent refused to pay the claim (Tr. pp. 19–21).

Respondent performed no acts in California nor did it own anything in California.

Respondent's First Counterpoint

(Counter to the Only Point of Petitioner)

The court of civil appeals correctly affirmed the judgment of the trial court for respondent because the California court did not obtain jurisdiction of respondent to render the judgment sued upon as the California Unauthorized Insurers' Process Act was as to respondent in violation of the due process clause, Section 1 of the fourteenth amendment to the Constitution of the United States since the California Act was not passed and did not become effective until after the policy sued on had been delivered and since respondent had no such contacts with California as to make it subject to such an act.

68w

Statement and Argument Under Respondent's First Counterpoint

Petitioner concedes (App. p. 5) that the only three cases which appear to have been decided by appellate courts where the constitutionality of Unauthorized Insurers' Process Acts were involved, are the three cases cited by the Court of Civil Appeals of Parmalee v. Iowa State Men's Traveling Association, 206 Fed. 2d 518, Parmalee v. Commercial Traveler's Mut. Acc. Ass'n. of America, 206 Fed. 2d 523 and Berg v. Commercial Traveler's Mut. Acc. Ass'n. of America, Utica, New York, 207 Fed. 2d 775. Each of these cases, under factual situations even stronger than those here involved, fully support the decision of the Court of Civil Appeals in this case.

However, petitioner seeks to argue that the basic authority (App. p. 3) for the constitutionality of the type of service of process involved in this case is found in Traveler's Health Assn. v. Commonwealth of Virginia, 339 U. S. 643, 70 S. Ct. 927, decided in 1950. As pointed out by the Court of Civil

Appeals, four members of the Court joined in the dissenting opinion wherein it is stated:

68x "An in personam judgment cannot be based upon service by registered letter on a non-resident corporation or a natural person neither of whom has ever been within the State of Virginia. Pennoyer vs. Neff, 95 U. S. 714, 24 L. Ed. 565; Old Wayne Mutual Life Ass'n. of Indianapolis, Indiana vs. McDonough, 204 U. S. 8, 22–23, 27 S. Ct. 236, 240, 241, 51 L. Ed. 345. * * *"

The opinion of Mr. Justice Black, joined in by only three other members of the Court, became the opinion of the Supreme Court of the United States only because a concurring opinion was written by Mr. Justice Douglas. Mr. Justice Douglas was careful to state in his separate opinion (339 U. S. 652–3, 70 S. Ct. 932):

"I put to one side the case where a policyholder seeks to sue the out of state company in Virginia. His ability to sue is not necessarily the measure of Virginia's power to regulate, as the court says in Old Wayne Mutual Life Association of Indianapolis, Indiana vs. McDonough, 204 U. S. 8, 21, 27 S. Ct. 236, 240, 51 L. Ed. 345." [Emphasis ours.]

Petitioner in urging the applicability of the Traveler's Health Ass'n. v. Commonwealth of Virginia, 70 S. Ct. 927, 339 U. S. 643, states (App. p. 3) that "the fact situation was strictly one of a 'Mail-Order' insurance business conducted by mail between the Nebraska home office of the insurance company and citizens of Virginia, and vice versa" and that "except for this activity, the Traveler's Health Association was not 'present' in Virginia and was not 'doing business' in Virginia." However, even the opinion of Mr. Justice Black was careful to point out (339 U. S. 648, 70 S. Ct. 930):

" * * the association did not engage in mere isolated or short lived transactions.* Its insurance certificates, *systematically and widely delivered in Virginia following solicitations based on recommendations of Virginians,* create continu-

68y ing obligations between the association, and each of the many certificate holders in the state. Appellants have caused claims for losses to be investigated and the Virginia courts were available to them in seeking to enforce obligations

created by the group of certificates. (See International Shoe Company v. Washington, supra, 326 U. S. 320, 66 S. Ct. 160, L. Ed. 95, 161 A. L. R. 1057.)" [Emphasis ours.]

Not only did the majority of the Supreme Court of the United States fail to hold as a matter of law that a policyholder might properly sue the out of state company in Virginia, but the factual situation involved in that case was entirely different from the single isolated transaction involved in the present case.

Petitioner urges that the cases cited by the Court of Appeals (Parmalee v. Iowa State Traveling Men's Association, 206 Fed. 2d 518, Parmalee v. Commercial Traveler's Mut. Acc. Ass'n., 206 Fed. 2d 523 and Berg v. Commercial Traveler's Mut. Acc. Ass'n. of America, 207 Fed. 2d 775) should not be considered binding or of much weight because the Fifth Circuit Court did not have the benefit of state court construction or reasoning (App. p. 6). Petitioner further seeks to argue that the California Unauthorized Insurers' Process Act is wholly a procedural statute dealing only with the method of service of process (App. p. 8) and that apparently therefore the Act may be given a retroactive effect without violating the Due Process Clause of the Constitution.

It should be noted that the cases cited by petitioner relate only to an alteration of the method of service of process in cases in which *"jurisdiction"* already existed on other grounds. Petitioner refuses to admit or fails to recognize that the California

Unauthorized Insurers' Act here involved purports to
68z create *"jurisdiction"* where none had existed before.

The act seeks to establish "jurisdiction" in the courts of California when those courts had not previously had "jurisdiction" as to this respondent.

Petitioner's arguments are met by the general rule as stated in *23 Amer. Juris. 341–2* as follows:

"Sec. 363. For Purposes of Jurisdiction and Service of Process.—In a great many cases the question arises whether a foreign corporation is doing business within a state in the sense required to subject it, absent consent, to the jurisdiction of the courts therein so that service of process on its actual or statu-

tory agent will support a personal judgment against it. *What amounts to doing business in this sense is not a question merely of local or of statutory construction. It is a question of jurisdiction* and, in the ordinary case, is ultimately a Federal one, *involving the constitutional requirements of due process of law, upon which decisions of the United States Supreme Court are final and binding authority.* The Supreme Court has recognized that a corporation may in fact be 'doing business' in a particular state or district, and yet not be doing business in such sense that process can there be served upon it. *What is not doing business under general principles governing the assumption of personal jurisdiction over foreign corporations or under the requirements of the due process clause of the Fourteenth Amendment cannot be made so by any state statute, either expressly or through construction.* * * *" [Emphasis ours.]

The citation of additional authorities would seem unnecessary under the particular factual situation shown by the record in this case.

68aa We respectfully submit that upon the basis of sound reasoning an dthe authorities cited petitioner's Application for Writ of Error should be denied.

Respectfully submitted.

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68bb [Clerk's certificate to foregoing paper omitted in printing.]

69 In the Supreme Court of Texas

No. A–5830

LULU B. McGEE

v.

INTERNATIONAL LIFE INSURANCE COMPANY

FROM HARRIS COUNTY, FIRST DISTRICT

Order refusing writ of error

June 6, 1956

This day came on to be heard application of petitioner for a writ of error to the Court of Civil Appeals for the First District and the same having been duly considered, and the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be refused; that applicant, Lulu B. McGee, and her surety, Fidelity & Deposit Co., of Maryland, pay all costs incurred on this application.

In the Supreme Court of Texas

JULY 11, 1956.

[Title omitted.]

FROM HARRIS COUNTY, FIRST DISTRICT

Order overruling motion for writ of error

July 11, 1956

This day came on to be heard petitioner's motion for rehearing of application for writ of error, and, after due consideration, it is ordered that said motion be, and is hereby, overruled.

75 In Court of Civil Appeals

Filed August 16, 1956

No. 12,942

Lulu B. McGee

v.

INTERNATIONAL LIFE INSURANCE COMPANY

Order granting appellant's motion to recall mandate and for stay of proceedings pending application for writ of certiorari to the United States Supreme Court

On this day came on to be heard, in chambers, appellant's motion to recall this Court's mandate issued by the Clerk of this Court on July 17, 1956, and for a stay of proceedings pending appellant's application for a writ of certiorari to the Supreme Court of the United States of America, and the same having been duly considered, it is therefore ordered that her said motion be granted; that the Clerk of this court do forthwith recall this Court's said mandate. It is further ordered that the proceedings herein be stayed pending final disposition of appellant's application for a writ of certiorari to the Supreme Court of the United States of America.

[File endorsement omitted.]

In Court of Civil Appeals

No. 12,942

Lulu B. McGee

v.

INTERNATIONAL LIFE INSURANCE COMPANY

Order recalling Court of Civil Appeals mandate

August 16, 1956

Whereas this Court has this date, in chambers, granted appellant's motion to recall the mandate of this Court in this cause issued July 17, 1956, and for a stay of proceedings pend-

ing appellant's application for a writ of certiorari to the Supreme Court of the United States of America, it is therefore ordered that such mandate mailed to the District Clerk of Harris County, Texas, be and the same hereby is recalled. It is further ordered that the Clerk of this Court certify a copy of this order to the District Clerk of Harris County, Texas, and that said District Clerk be and hereby is directed to immediately return the said mandate to the Clerk of this Court.

76

[File endorsement omitted.]

78 [Clerk's certificate to foregoing transcript omitted in printing.]

79 Supreme Court of the United States
No. 314 Misc. —, October Term, 1956

LULU B. McGEE, PETITIONER

v.

INTERNATIONAL LIFE INSURANCE COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, FIRST SUPREME JUDICIAL DISTRICT

Order allowing certiorari

December 3, 1956.

On consideration of the motion for lease to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 608.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 50

LULU B. McGEE,

Petitioner,

vs.

INTERNATIONAL LIFE INSURANCE COMPANY,

Respondent

BRIEF FOR PETITIONER

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Of Counsel:
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 608

LULU B. McGEE,

Petitioner,

vs.

INTERNATIONAL LIFE INSURANCE COMPANY,

Respondent

BRIEF FOR PETITIONER

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Reported Opinions Below

The only reported opinion of the courts below is that of the Court of Civil Appeals for the First Supreme Judicial District of Texas, which was rendered on March 8, 1956, and is reported in 288 S.W. (2d) 579.

Jurisdiction

The Supreme Court of Texas is the highest court of Texas in which a decision herein could be had. Its order overruling Petitioner's Motion for Rehearing was entered July 11, 1956. 28 U.S.C.A. 2101(C). The Petition for Writ of Certiorari was filed herein on October 6, 1956; and the writ was granted on December 3, 1956.

Jurisdiction to review this case upon Writ of Certiorari

is conferred upon this Court by Title 28 U.S.C.A., Sec. 1257(3).

The validity of a state statute of the State of California is in question on the ground of its being repugnant to the Constitution of the United States, and the decision sought to be reviewed is against the validity of the statute.

Constitutional Provision and Statutes Involved

Section one, Fourteenth Amendment to the Constitution of the United States of America.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Insurance Code of California, Sections 1610-1620; Deerings Insurance Code of California, Ann., Sec. 1610-1620.

See Appendix "A."

Question for Review

The only question for review is whether or not the final judgment of a court of competent jurisdiction in California, which judgment is valid on its face, is void for want of jurisdiction in the California Court. It can only be void if the service of process provisions of the California Unauthorized Insurers' Process Act are unconstitutional under Section One of the Fourteenth Amendment to the Constitution of the United States of America.

Statement of the Case

This is a suit on a final judgment obtained in a California Court. (Tr. pps. 1-6, 20).

Briefly, Lowell Stepp Franklin, deceased, had a policy of insurance with Respondent, which provided for payment on accidental death. His mother, Petitioner here, was the named beneficiary in the policy. (Tr. pps. 17, 22). The original policy involved was issued by Empire Mutual Insurance Company to the deceased on April 21, 1944. (Tr. pps. 16, 21-23). The policy was re-insured by the Respondent on September 1, 1948. (Tr. pps. 16-17, 33-34). Respondent continued to mail premium-due notices from Texas to Franklin in California, and Franklin mailed his premiums from California to Respondent in Texas. (Tr. p. 17). The California Unauthorized Insurers' Process Act became effective October 1, 1949. (Tr. pps. 54-59). Thus, this policy by this unauthorized insurer was in full force prior to the effective date of the California Unauthorized Insurers' Process Act. Lowell Stepp Franklin died December 1, 1950 (Tr. p. 17).

When the Respondent failed to pay the proceeds of the policy to Petitioner (Tr. p. 17), after Franklin's death, she filed suit on the policy in California. (Tr. pps. 18, 44-47). Proper service (Tr. pps. 18-19, 47-50) was had on Respondent under the provisions of the California Unauthorized Insurers' Process Act (Tr. pps. 54-59). After Respondent failed to appear and answer (Tr. p. 19), a default judgment was taken. (Tr. pps. 20, 50-51). It was upon this final default judgment that suit was filed in Texas (Tr. pps. 20, 1-4).

The case below was tried upon a stipulation of fact. (Tr. pps. 15-59).

The constitutional question was first raised in the trial court by the Respondent's pleadings (Tr. pps. 6-13), the

trial court holding for the Respondent and against the validity of the statute. (Tr. pps. 13-15). It was next raised in the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston, Texas by the briefs of both parties. (Appellant's and Appellee's Briefs). After that court also held against the validity of the statute, (Tr. pps. 61-68), the question was raised by Petitioner's Motion for Rehearing before that Court (Tr. pps. 68-70). The question was raised in the Supreme Court of Texas both in the Pefition for Writ of Error (Tr. pps. 70-85) and Petitioner's Motion for Rehearing (Petitioner's Motion for Rehearing on Application for Writ of Error).

ARGUMENT

A court by proper service of process may acquire jurisdiction over an individual not domiciled within the State who does acts or owns things in a State as to causes of action arising out of such acts or such ownership, if a statute of the State so provides at the time when the cause of action arises without doing violence to Section One of the Fourteenth Amendment to the Constitution of the United States of America.

With each advancement in the ease and speed of travel and the means of communication, there has been an increase in the movement of people from state to state, and an increase in the amount of "business" that is conducted by telephone, telegraph and the mails. While we know of no statistics on the matter, we are confident that the court will take judicial knowledge of the fact that a substantial amount of business today is conducted across state lines by use of the United States mail service. This is especially true in the insurance business. The United States mail has in large measure taken over the jobs once performed by the insurance salesmen, collectors, etc. Regula-

tion of this "mail-order" insurance business has long been a legislative problem in the various states.[1] Relying upon *Pennoyer* vs. *Neff*, 95 U.S. 714, 24 L. Ed. 565, the insurance fraternity has argued that the United States mail service provided a sanctuary, a no-man's-land, into which the states were powerless to reach in an effort to protect the interest of their citizens. In an effort to solve the problem thus presented, the National Association of Insurance Commissioners, an organization of public officials in the various states, whose jobs are to oversee and regulate the insurance business, sponsored the passage of a Uniform Unauthorized Insurers' Process Act. With only slight variations in the text; thirty-eight of the forty-eight states have now adopted this Uniform Unauthorized Insurers' Process Act; California being among these thirty-eight states.

In our view, the basic authority for the constitutionality of the type of service of process here involved is to be found in *Virginia* v. *Travelers Health Association*, 339 U.S. 643, 70 S.Ct. 927, and the cases there cited. The Travelers Health Association case was decided by this Honorable Court in 1950.

In the Travelers Health Association case, the fact situation is strictly one of "mail-order" insurance business conducted by mail between the Nebraska home office of the insurance company and citizens of Virginia, and vice versa. Except for this activity, the Travelers Health Association was not "present" in Virginia and was not "doing business" in Virginia. The service of process method employed by Virginia, as is here the case, was upon the Secretary of the Commonwealth of Virginia, who, in turn, served the Travelers Health Association with process by

[1] For some statistics indicating the magnitude of the insurance business see *U. S.* v. *South-Eastern Underwriters Ass'n*, 64 S.Ct. 1162, 1166-68, 322 U.S. 533.

registered mail. It was the contention of the Travelers Health Association that under these facts, Virginia had no "power" to reach it under Section One of the Fourteenth Amendment to the Constitution of the United States of America. With this contention, we think, this Honorable Court disagreed. In doing so, among other things, the Court said:

> "* * * where business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state * * * (p. 929).
>
> "* * * And in International Shoe Company v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 161 A.L.R. 1057, this Court, after reviewing past cases concluded: 'Due process requires only that in order to subject a Defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'
>
> "Measured by the principles of The Osborn, Hoopeston & International Shoe Cases, the contacts and ties of appellants with Virginia residents, together with that state's interest in faithful observance of the certificate obligations, justifies subjecting appellants to cease and desist proceedings under paragraph 6. * * *
>
> "*Moreover, if Virginia is without power to require this association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificate holders might be Nebraska. Health benefit claims are seldom so large that Virginia policy*

*holders could afford the expense and trouble of a Nebraska lawsuit. In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would more likely live and where claims for losses would presumably be investigated * * *. And prior decisions of this court have referred to the unwisdom, unfairness and injustice of permitting policy holders to seek redress only in some distant state where the insurer is incorporated. The due process clause does not forbid a state to protect its citizens from such injustice.* (p. 930)."

However, the Galveston Court of Civil Appeals took the position that this case is not "factually analogous to, or legally applicable to the present case," and that it is not "any authority for the proposition that the requirement of due process has been met in this present case." In so holding, the Galveston Court seized upon this language in the concurring opinion of Justice Douglas (339 U.S. 644):

> "Since the formula adopted by the Court is adequate to dispose of this case, I have joined in the opinion. But I feel that the type of problem presented requires a more selective treatment. Hence my separate opinion."

It seems clear to us that the majority opinion by Justice Black is "factually analogous" to and, "legally applicable" to the present case, and is "authority for the proposition that the requirement of due process has been met in this present case." Obviously, the question revolves around the concurring opinion of Justice Douglas. We think it apparent that Justice Douglas was no basically in disagreement with Justice Black's opinion, but felt that Virginia's power to regulate required far less "minimum

contacts," than he thought Justice Black's opinion was requiring, for he said:

> "The requirements of due process do not, in my opinion, preclude the extension of Virginia's regulatory scheme to Appellant. I put to one side the case where a policyholder seeks to sue the out-of-state company in Virginia. *His ability to sue is not necessarily the measure of Virginia's power to regulate.*
>
> "Whether such solicitation is isolate or continuous, it is activity which Virginia can regulate."

We feel that if the Galveston Court is correct in saying that this Honorable Court has not decided the question involved here, then the question should be decided in view of the very large number of states having statutes of the kind involved here. On the other hand, if we be correct in our construction of the Travelers Health Association case, supra, then the Galveston Court has clearly decided this case is a way not in accord with the opinion of this Honorable Court in that case.

So far as we have been able to determine, only three cases have been decided by circuit courts where the constitutionality of these Unauthorized Insurers' Process Acts is involved.[2] All three cases come from the Court of Ap-

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[2] We have found two cases by District Courts where the same and a similar statute were involved. *Ace Grain Co.* v. *American Eagle Fire Ins. Co.*, 95 F.Supp. 784; *Storey* v. *United Ins. Co.*, 64 F.Supp. 896. In both cases the court held the statutes constitutional, relying on the Travelers Health Association case as authority. We have also found a few state court cases where the same or a similar statute was involved, and the statutes were held constitutional under the authority of the Travelers Health Association case. *Zacharakis* v. *Bunker Hill Mut. Ins. Co.*, 281 App. Div. 487, 120 N.Y.S. 2d 418, leave to app. gr. 281 App. Div. 1019, 121 N.Y.S. 2d 271; *Suits* v. *Old Equity Life Ins. Co.*, 241 N.C. 483, 85 S.E. 2d 602; see also *White* v. *Indiana Travelers Assur. Co.*, 22 So. 2d 137.

peals for the Fifth Circuit. Parmalee v. Iowa State Traveling Men's Association, 206 F(2d) 518, 44 A.L.R. 2d 410; cert. den. 346 U.S. 877, 74 S. Ct. 125; Parmalee v. Commercial Travelers Mutual Accident Association, 206 F(2d) 523; and Berg v. Commercial Mutual Accident Association of America, 207 F(2d) 775. The following language from the opinion of the Galveston Court of the Civil Appeals adequately demonstrates the weight given to these three cases by both the trial court and the Galveston Court:

> "Appellant attacks the rational of the decision of the C.C.A. 5th Circuit upon the proposition that the Court erroneously designated the statute there involved as a 'regulatory law' whereas it is a 'procedural' law. *Whatever the court may have designated the statute, there can be no doubt but that the court was concerned with the question of due process.* And further, there can be no doubt but that under analagous factual situations, that court has thrice held compliance with similar statutes not to constitute due process. *We rest our decision of the present case upon that authority.*"

Surprisingly enough, in those cases, the 5th Circuit Court apparently agreed with our analysis of the Travelers Health Association opinion by this Honorable Court and cited it as authority. On the other hand, the Galveston Court relied upon one of the refinements made by the 5th Circuit cases, but rejected its view on the applicability of the Travelers Health Association case. An analysis of the three cases is certainly in order; and since the 5th Circuit Court actually wrote for all three cases in the Iowa State Traveling Men's Association case, supra, we shall concern ourselves only with that case.

While holding the Unauthorized Insurers' Process Acts

constitutional and citing the Traveler's Health Association case, supra, as an authority, the court very narrowly construed the statute.

It held first that "We construe the legislation to apply only to policies of insurance delivered in Florida to Florida residents." While we do not agree that such a construction is warranted, we find no need to quarrel with it here since we have a policy of insurance "delivered" in California to a California "resident."

Next the court sought to construe the act to apply only to suits "arising out of any such contract of insurance." Such a construction is not readily apparent from the language of the statute, and the court realized this, saying:

> "While the statute refers to '*any of the following acts*' we understand it to mean rather the doing of any of the proscribed acts *from which results the issuance or delivery of a contract of insurance in the state.* The force of the statute is directed to suits upon such contracts. However, for the purposes of Section Three of the Act, *each act may have a consequence of providing means of service of process*, but then also only as to suits upon contracts delivered in Florida to Florida residents. However this may be, in the present case each and every requirement of the statute is met."

Not only does it appear that the court was indecisive about this unnecessary construction, but, it appears, the court relied only indirectly upon it in deciding the second of the Parmalee cases. Actually, this construction, as well as the other one discussed above, has the effect of literally destroying the intended purpose of the acts. But, again, for our purposes here, we need not quarrel since we have service of process based on a completed policy delivered in California to a California resident.

Finally, the court said:

> "*As a regulatory law it plainly can given no effect which will impose retroactively, the provisions of the statute upon unauthorized insurers having policies in force prior to the enactment of the statute.* The distinctions are not hypothetical, but are substantial in the proper application of the statute. *They mark the line between due process and unauthorized state action.*"

It is with this language that we must be concerned here since it is the only test laid down by the Fifth Circuit which the instant case does not meet, and since the Texas courts felt obligated to follow the holding of the Fifth Circuit cases.

The issue is clear cut since the policy issued by this unauthorized insurer was in force prior to the effective date of the California Unauthorized Insurers' Process Act.

The first error into which the Court fell in this last proposition is in designating the act as a "regulatory law." *The act is wholly procedural, dealing only with process, the service of it, and the method of defense in such a case.*

NO ONE HAS A CONSTITUTIONAL, OR VESTED RIGHT NOT TO BE SUED.

The Constitution of the United States neither protects nor guarantees any particular form or method of procedure, but is satisfied if the litigant be given reasonable notice and a reasonable opportunity to be heard before judgment. See State of Missouri ex rel. *Hurwitz* v. *North, et al, Board of Health of State of Missouri*, 271 U.S. 40, 46 S.Ct. 384; *Hurtado* v. *People of the State of California*, 110 U.S. 516, 4 S.Ct. 111; *Louisville and Nashville Railroad Co.* v. *Schmidt*, 177 U.S. 230, 20 S.Ct. 620; *Iowa Cent. Ry. Company* v. *State of Iowa*, 160 U.S. 389, 16 S.Ct. 344; *Honeyman* v. *Hanan*, 302 U.S. 375, 58 S.Ct. 273.

That statutes relating to service of process are procedural only is well-settled. That a procedural statute operates retroactively does not make it invalid, unless it disturbs some vested right, is also well settled.

"*Statutes relating to the service of process, as for example, providing a new or more convenient method of service * * * relate to a mere matter of procedure, and therefore to not disturb vested rights.* 16 CJS 1257, para. 263.

"Except as they may be expressly protected by constitutional provisions, *no one has a vested right in the rules of practice or modes of procedure in force when a cause of action arises or suit is brought, and such rules of practice or modes of procedure may be amended, altered, or repealed, and others substituted in their place, and the changes made applicable to pending actions at any time before the final judgment of the court becomes effective, or at least before vested rights have been acquired* under them, provided an adequate remedy or the essential elements of protection remain. * * * Unless provided otherwise by the act itself, the new statute governs all proceedings had thereafter, including those in actions that have accrued and are pending at the time of its passage." 16 CJS 1254, para. 261.

"*Legislation designed to enforce performance of a contract executed prior to the enactment of the legislation does not impair the obligation of contract.*" 16A CJS 55, para. 380.

"Both in jurisdictions in which retroactive laws are expressly prohibited by constitutional provisions, and in jurisdictions in which there are no such inhibitions, it is well settled that *retroactive laws which affect only*

remedies or procedure, or relate exclusively to remedial rights, as distinguished from those affecting substantive or substantial rights, are valid provided the changes made are reasonable and and not highly injurious, oppressive or unjust, and do not disturb vested rights or impair contractual obligations, and provided that there are no special constitutional restrictions. * * *

"*Accordingly, statutes may be valid which retroactively affect matters of practice generally, venue, process, parties, defenses* * * *." 16A CJS 108, para. 418.

Moreover, both of the states involved here, California and Texas, follow this general rule. One such California case is *Lincoln* v. *Superior Court*, 39 Pac. 2nd, 405, 2 Cal. 2nd, 127 in which the plaintiff was a beneficiary under a trust deed. This was a suit to foreclose the deed. When the deed was executed, generally speaking, there was no right of foreclosure existing under the law of California. Before the bringing of this suit, however, a right of foreclosure was created by legislation. The court in holding the statute constitutional said:

"*The section is a remedial statute which merely affords a new and additional means of enforcing a right. The cases distinguish between laws which impair the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made.* Bernheimer v. Converse, 206 U.S. 516, 530, 27 S.Ct. 755, 51 L.Ed. 1163. *The obligation of a contract has reference alone to the rights of the parties arising thereunder and not to any remedy for their enforcement. A remedy afforded by a statute passed subsequent to the execution date of the contract*

may be evoked by a party to the contract who has been wronged by its nonperformance. In other words, one who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legislation that is designed only to enforce performance of his obligation. Such legislation does not impair the obligation of the contract and is constitutional. Wilson v. Standifer, 184 U.S. 399, 410, 22 S.Ct. 384, 46 L.Ed. 612; New Orleans C. & L. Ry. Co. v. Louisiana, 157 U.S. 219, 15 S.Ct. 581, 39 L.Ed. 679; Aikins v. Kinsbury, 170 Cal. 674, 678-681, 151 P. 145; Colma Veg. Ass'n. v. Benetti, 91 Cal. App. 103, 112, 267 P. 172; Maguire v. Cuninngham, 64 Cal. App. 536, 551-553, 222 P. 838.

"That Sec. 728a, Supra, is purely remedial does not admit of doubt, as it affords, as stated above, merely a new and additional means of enforcing an existing right. The respective rights of the trustor and beneficiary are neither increased nor diminished by the section. It does not enlarge the obligation of the trustor, but only enables the trustee or beneficiary to compel the performance of that obligation."

A Texas case of particular interest on this point is the case of *New Amsterdam Casualty Company* v. *Patton*, 22 S.W.(2d) 540, 36 S.W.(2d) 1000. In that case an amendment to the Workmen's Compensation Law was involved. On November 2, 1926, Patton was injured in the course of his employment. A final award was rendered by the Industrial Accident Board on March 28, 1928. Prior to June, 1927, the Workmen's Compensation Act required Notice of Appeal from a Board award to be given both to the Industrial Accident Board and the adverse party. By an amendment, effective in June, 1927, the Act was changed so

as to require Notice of Appeal to be given only to the Industrial Accident Board. The compensation carrier, desiring to appeal from the March 28, 1928, Board award, gave Notice of Appeal only to the Industrial Accident Board. Thereafter, on May 4, 1928, the compensation carrier filed its suit to set aside the Board award. Patton contended that to apply the 1927 amendment to his claim was to give the amendment a retroactive effect. The Galveston Court of Civil Appeals, in holding against Patton, said in part:

> "* * * *while the giving of such a notice is undoubtedly a jurisdictional element* (Texas Employers Insurance Ass'n. v. Fussell (Tex. Civ. App.) 1 S.W.2d 404), *it is also essentially procedural and remedial in its nature, pertaining only to the manner in which an award may be taken on into the courts*, and not having to do with any substantive or vested rights of the adverse party; its administration in the courts, therefore, seems to us to fall within the rule applied by that class of cases holding that a mere remedy, either in or outside of the courthouse, that does not impair the obligations of a contract or other vested right may be changed at the will of the legislature without legally aggrieving any party affected thereby (Life Insurance Co. v. Wolters (Tex. Com. App.) 10 S.W.2d 698, Oldum v. Garner, 86 Tex. 374, 25 S.W. 181;" * * *
>
> "The amendment by the Fortieth Legislature in this instance took away no right from the appellee except the mere privilege of being directly served with a notice that the casualty company would not abide by the award as ending the controversy; his compensation rate was not effected, neither was his right of recovery nor status in any other substantive respect altered in any way; the single change made was in the manner in

which his adversary might perfect its resort to the courts from an award unfavorable to it."

The Commission of Appeals, in affirming the Galveston Court said:

> "The legal relation which arises between the employee, the employer and the insurer, who bring themselves within the scope of operation of the Workmen's Compensation Statutes, is contractual. * * * By implication, the statutes then existing become part of the contract. This, in a sense, includes the provisions of the statutes which deal with the matter of remedy. The law, however, does not imply a purpose on the part of the parties to make such remedial provisions a part of the 'obligation' of the contract. *In presuming that the parties entered into the contractual relation in contemplation of the remedies afforded by the statutes, the law further presumes that the power of the legislature to substitute other remedies was contemplated. Consequently, subsequent legislation which effects a change in this respect, is not rendered invalid as to said parties, by the constitutional provision against the impairment of the obligations of contracts, if an adequate remedy is left available.* Farmers Life Insurance Company v. Wolters (Tex. Com. App.) 10 S.W. 2d 698."

We consider the three 5th Circuit cases under consideration, insofar as this point is concerned, not only to be in conflict with the decisions of this court cited above, but to be in conflict with many decisions from other circuits, as well as in conflict with other decisions of the 5th Circuit Court. Because *United States* v. *Resch*, 85 F. Supp. 389, cites several of these circuit court cases, and because it applied the rule to a much more delicate situation than is

involved here, we think a reference to it to be proper. The statute involved was the Housing and Rent Act of 1947. Prior to 1949 only the tenant had the right to sue for treble damages for violation of the act. The alleged violation occurred while the act so stated, that is prior to 1949. In 1949 the act was amended to permit the government to institute suit for treble damages if the tenant failed to do so for thirty (30) days. In holding the amendment constitutional:

> "That amendment to Sec. 205 of the Housing & Rent Act of 1947 created a remedy in favor of the Government which it did not have under the 1947 Act. However, the same remedy was previous to the 1949 amendment available to the tenant by virtue of a 1948 amendment. No new penalty was created. The damages formerly recoverable by the tenant were not increased and the remedy given to the government was predicated on the failure of the tenant to bring his suit within a given time.
>
> "Congress or a state legislature may pass retroactive laws such as in their operation may affect pending suits and give to a party a remedy which he did not previously possess, or modify an existing remedy or remove an impediment in the way of legal proceedings. Landy v. United States, 6 Cir., 108 F. 2d 698, 705 cert. den. 309 U.S. 681, 60 S. Ct. 721, 84 L. Ed. 124.
>
> "Martini v. Porter, 9 Cir., 157 F. 2d 35, 40, cert. den. 330 U.S. 848, 67 S. Ct. 1091, 91 L. Ed., 606, the Court said: 'The fact that the order has a retroactive effect does not necessarily make it invalid.' Compare Paramino Lumber Co. v. Marchall, 309 U.S. 370, 60 S. Ct. 600, 84 L. Ed. 814 * * * *No vested right of appellant's was disturbed for 'there is no such thing as a vested*

right to do wrong.' See also Bowles v. Strickland, 5 Cir., 151 F. 2d 419 and Bowles v. Miller, 10 Cir., 154 F. 2d 992."

We also consider it of some weight that the Restatement of Judgments, Sec. 23 provides:

> "A court by proper service of process may acquire jurisdiction over an individual not domiciled within the state who does acts or owns things in a state which are of a sort dangerous to life or property, as to causes of action arising out of such acts or such ownership, *if a statute of the state so provides at the time the cause of action arises.* * * *
>
> "Comment (a): *The Rule stated in this section is not applicable if at the time when the cause of action arose there was no statute in the state providing for the acquiring of jurisdiction over the defendant.*

It is significant that the condition given in the Restatement of Judgments is that the statute of the state exist at the time the cause of action arises. Clearly, it is not contemplated, as the Fifth Circuit indicated, that the existence of the statute must pre-date the existence of the policy of insurance. To follow the logic of the Fifth Circuit is to destroy the time-honored distinction between matters of "remedy" and matters of "substance."

We think the second error of the Fifth Circuit Court in the Parmalee case, in saying that the effective date of the statute must pre-date the policy, was that it failed, even under its reasoning, to take into account the conduct of that unauthorized insurer between 1949, the effective date of the statute, and 1951, the date of the insured's death. So far as the facts disclose, we may assume that the insurance company there, after 1949, continued in the course of its mail order business in Florida. Certainly, it continued

its mail-order dealings with the insured after the effective date of the act, and after it was aware, or should have been aware of the existence of the act, and the consequences to it of continuing its mail-order insurance business in that state.

In this situation, we are impressed with the reasoning of the New Jersey Federal District Court in *Boches v. Miami Airline*, 111 F. Supp. 133. In that case, a New Jersey statute made the Secretary of State the service agent for non-domiciled corporations operating aircraft over New Jersey as to civil cases "arising out of or by reason of any accident or collision occurring on or over the land or waters or in the air space of this State." That statute became effective May 16, 1952. The accident causing the injuries complained of occurred December 16, 1951. Service was had on the defendant November 21, 1952. Holding the application of the statute constitutional in that situation, the court said:

> "The cases cited and the Restatement would seem to be determinative of this motion. But comparison of the case at bar with these authorities shows a rational of differentiation. Since the passage of the act above referred to, the defendant company, which previous to its passage had done business in New Jersey, has continued to carry on its aircraft operations in the state. *The question arises as to whether by such continuance the defendant may be considered to have consented to accept process through service on the Secretary of State in causes of action arising prior to May 16, 1952,* the effective date of N.J.S.A. 6:5-3. None of the cited authorities deals with this particular problem, nor has it been directly treated by the Restatement of Judgments. These would seem to apply to situations where a single act resulting in injury is casually performed,

as distinguished from acts performed by those doing business in the state. *It is the court's considered opinion that the defendant's continued operation in the state after May 16, 1952, rendered it amenable to process under N.J.S.A. 6:5-3 for causes of action arising before this date but while it was doing business in the state.*

"Defendant argues that to uphold this service would affect its vested rights. *It is hard to imagine however how there can be a vested right not to be served. Service of process is itself a matter of adjective law, since it relates to and deals with the mechanics of practice and procedure, the legal machinery by which the substantive law is made effective.* 72 C.J.S., process, para. 25. *It deals with remedial rights, the means given for enforcing a claim, or the process and machinery by which the facts are made known to the court.* Goodrich, conflict of laws, 2d Ed., pps. 188, 189. * * *

"*Defendant then had no vested right not to be served since service, itself, is by its nature procedural and may be changed by the sovereign* whose duty it is to determine such procedure."

In the case at hand, we do not need to go so far as the Boches case goes since clearly the cause of action here arose after the effective date of the California Statute. But, certainly, it is logical to say that where an insurance company continues doing that which it knows will subject it to service of process if and when a cause of action arises under its policies, it has "consented" to place, or voluntarily placed itself under the act. In truth, the language of the act notifies such companies that to continue doing any of these acts, by mail or otherwise: (1) issuance or delivery

of a policy of insurance, (2) solicitation, (3) collection of premiums, or (4) "any other transaction of business arising out of such contracts," will subject them to service of process in suits brought in the state.

Like the New Jersey Court, service of process being procedural only, we think in our case, the Respondent, by continuing its mail activities in California with the deceased from October 1, 1949, the effective date of the California Act, to December 11, 1950, the date of Franklin's death, voluntarily and knowingly subjected itself to the terms of the California Unauthorized Insurers' Process Act.

Conclusion

Wherefore, premises considered, Petitioner prays that this Honorable Court reverse and remand this case with instructions to enter judgment for the Petitioner.

Respectfully submitted,

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APPENDIX "A"

CHAPTER 495

An act to add Article 4, comprising Sections 1610 to 1920, inclusive, to Chapter 4, Part 2, Division 1 of the Insurance Code, relating to actions in this State against nonadmitted insurers.

The people of the State of California do enact as follows:

SECTION 1. The purpose of this act is to subject certain insurers to the jurisdiction of courts of this State in suits by or on behalf of insured or beneficiaries under insurance contracts. The Legislature declares that it is a subject of concern that nonadmitted insurers have issued policies of insurance to residents of this State physically present herein at the time of such issuance, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies; that this State has an interest in providing to its residents a convenient forum for the purpose of asserting and enforcing legal rights under such policies; that if such residents are left to seek remedy in distant forums they will be, for practical purposes, without remedy. In furtherance of such state interest, the Legislature herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this State, and also exercises powers and privileges available to the State by virtue of Public Law 15, 79th Congress of the United States, Chapter 29, First Session, S. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

SEC. 2. Article 4, comprising Sections 1610 to 1620, inclusive, is added to the Insurance Code, to read:

Article 4. Actions against nonadmitted insurers.

1610. Any of the acts described in Section 1610, when effected in this State, by mail or otherwise, by a foreign or alien insurer which is nonadmitted at the time of the solicitation, insurance or delivery by it of contracts of insurance to residents of, or to corporations authorized to do business in, this State, is equivalent to and shall constitute an appointment by such insurer of the commissioner and his successor or successors in office to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.

1611. The acts referred to in Section 1610 are:

(1) The issuance or delivery to residents of, or to corporations authorized to do business in, this State of contracts of insurance insuring (a) the lives or persons or residents of this State physically present herein at the time of such issuance or delivery or (b) property or operations located in this State.

(2) The solicitation of applications for such contracts.

(3) The collection of premiums, membership fees, assessments or other considerations for such contracts.

(4) Any other transaction of business arising out of such contracts.

1612. Such service or process may be made by delivering to and leaving with the commissioner or some person in apparent charge of his office two copies thereof. The Commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him.

1613. Such service of process in the manner provided in Section 1612 is valid and sufficient, and gives jurisdiction over the person of such insurer, provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

1614. No plaintiff or complainant shall be entitled to a judgment by default in any such action, suit or proceeding in which service of process is effected in the manner provided in Section 1612 until the expiration of 30 days from date of the filing of the affidavit of compliance.

1615. Nothing in this article contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

1616. Before any nonadmitted foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such insurer shall either

(1) procure a certificate of authority to transact insurance in this State; or (2) deposit with the clerk of the court in which such action, suit or proceeding is pending cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action.

1617. The court in any action, suit, or proceeding, in which service of process is effected in the manner provided in Section 1612 may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Section 1616 and to defend such action.

1618. Nothing in Section 1616 is to be construed to prevent a nonadmitted foreign or alien insurer from filing a motion to quash or writ or to set aside service thereof made in the manner provided in Section 1612 on the ground that such insurer has not done any of the acts described in Section 1611.

1619. In any action against a nonadmitted foreign or alien insurer upon a contract of insurance issued or delivered in this State to a resident thereof or to a corporation authorized to do business therein, if the insurer has failed for 30 days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include such fee in any judgment that may be rendered in such action. Such fee shall not exceed 12½ percent of the amount which the court or jury finds the plaintiff is entitled to recover against the insurer, but in no event shall such fee be less than twenty-five dollars ($25.00). Failure of an insurer to defend any such action shall be

deemed prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

SEC. 3. Section 1620 is added to the Insurance Code, to read:

1620. The provisions of the preceding sections of this article shall not apply to any action, suit or proceeding against any unauthorized foreign or alien insurer arising out of any contract of insurance effected in accordance with Sections 1760.5 and 1763 where such contract contains a provision designating a resident of this State or any firm of which one member is a resident of this State to be its true and lawful attorney upon whom may be served all lawful process in any such action, suit or proceeding.

In any such action, suit or proceeding arising out of any such contract of insurance, the court may require the insurer to deposit cash or securities, or file bond with good and sufficient sureties, to be approved by the court, in an amount sufficient to secure the payment of any final Judgment which may be rendered unless such insurer makes a showing satisfactory to the court that it maintains in a state of the United States funds or securities in trust or otherwise, sufficient and available to satisfy any such final judgment and that it will pay any such judgment without requiring suit to be brought thereon in the state where such securities or funds are located.

SEC. 4. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 5. This act may be cited as the Unauthorized Insurers Process Act.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 50

LULU B. McGEE,

Petitioner,

vs.

INTERNATIONAL LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

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Additional Statement of the Case

Respondent's present gratuitous assertions as to its virtuousness come too late.

These assertions of alleged fact fall into three groups.

First, the Petitioner's suit in California was baseless and unwarranted (Respondent's brief, pp. 4, 11 and 12).

Second, that Respondent's transactions were isolated, and that its business was not of the mail-order variety (Respondent's brief, pp. 7, 8, 10, 11 and 12).

Third, that Respondent's transactions with deceased, resulting as they did from its reinsurance contract with the Empire Mutual Insurance Company of Arizona, were required and involuntary (Respondent's brief, p. 18).

ARGUMENT

A Judgment Valid on Its Face Is Not Subject to Collateral Attack

Whether Respondent could have established to the satisfaction of the trial court in California the unsworn, self-serving testimony it presents here no one now knows. Whether the trial court actually considered any or all of these alleged facts and found against Respondent is likewise not now known. In any event, the Respondent cannot reopen its case here, or in the Texas courts and present that testimony which it could and should have attempted to offer to the California court for consideration by the trier-of-the-facts.

There is no contention that this judgment of the California court is void on its face. 25 Tex. Jur. 692, para. 254. What Respondent seeks to do here is avoid, or evade, collaterally, the effect of the California judgment which is obviously valid on its face. 25 Tex. Jur. 678, para. 250.

> "A collateral attack on a judgment is an attempt to impeach a judgment by matters dehors the record in an action other than that in which it is rendered. It is an attempt to avoid the effect of a judgment or order perhaps made in some other proceeding." Clark v. DeSchamps, 109 Cal. App. 2nd 765, 769, 241 Pac. 2nd 681; Nielson v. Emerson, 119 Cal. App. 214, 6 Cal. App. 2nd 878, 137 Pac. 2nd 861.
>
> "A direct attack is one within the proceeding itself, taken within the time and according to the plan provided by law; for example, motions for new trial, appeal and motions to set aside the judgment in the manner provided by Code of Civil Procedure, Sec. 473." City of Los Angeles v. Glassell, 203 Cal. 44, 49,

262 Pac. 1084; McBeth v. McBeth, 219 Cal. 47, 25 Pac. 2nd 11.

"Insofar as judgments which do not show invalidity on their face are concerned, the main difference between the direct and collateral attack is that in the direct attack the true facts may be shown, while in the case of collateral attack we are confined to the inspection of the record conclusively presumed to be correct." City of Los Angeles v. Glassell, supra.

We think what has already been said is adequate answer to the first question presented in Respondent's brief (Respondent's brief, pp. 5-12). However, as to Respondent's arguments therein which we have grouped under Second and Third above, we would urge a further argument. For this argument, we assume that Respondent's policy with deceased was in truth and in fact its only policy issued to any citizen of California. We make the assumption without admitting the efficacy of the construction which Respondent puts upon the stipulation of fact entered into in the court below (Respondent's brief, p. 2). In truth, the construction now urged by Respondent was not urged by it until the case was in the Texas Court of Civil Appeals. Neither counsel for Respondent nor counsel for Petitioner knew the extent of the Respondent's business activity in California at the time the stipulation was entered into. The language of the stipulation referred to was intended to relate solely to the relationship between the two insurance companies on the one hand and the insured and his beneficiary on the other hand.

In any event, the facts are that in the fourteen months from October 1, 1949, the date the California Unauthorized Insurers' Process Act became effective (R. p. 55), and the date the claim herein arose, that is, the date of the insured's death (R. p. 17), there were approximately 4,666

separate invasions by Respondent into the State of California to do business with the deceased. Since premium payments could have been made by the month, the number of such invasions might well have been at least thirteen (R. pp. 21-36). And, had the deceased-insured lived longer, the number of such monthly or quarterly invasions of California by Respondent would have increased proportionately. It seems to us that the constitutionality of this statute ought not be made to depend upon the fortuitous longevity of the insured or the fortuitous selection of one premium payment plan over another by the insured. The record shows that premium notices were mailed quarterly by Respondent to the deceased-insured (R. pp. 21-36) and he, in turn, mailed Respondent the premium due (R. p. 17). The effect of Respondent's use of the United States mail was the same as if Respondent had sent its collector into California to notify the deceased-insured of the due date of the premium, and which collector then collected such premiums and delivered them to Respondent. *Schutt* v. *Commercial Travelers' Mutual Accident Association*, 229 F.2d 158, cert. den. 351 U.S. 940, 76 S.Ct. 836, 100 Law. Ed. 1466.

It appears that Respondent's business in California was not as isolated or minimal as Respondent would lead the court to believe, unless some importance is to be attached to the small premium involved. Again, we do not feel that the constitutionality of this statute should be made to depend upon the fortuitous financial circumstances of the insured. Should this statute be more objectionable on constitutional grounds if the premium paid is one dollar per month than if it is five hundred or five thousand dollars per month?

Certainly, there is nothing in the California Unauthorized Insurers' Process Act to indicate that the California

Legislature intended two such unpredictable elements to control the applicability of the statute to a given fact situation.

Section 1 of the California Act provides:

> "Section 1. The purpose of this act is to subject certain insurers to the jurisdiction of courts of this state in suits by or on behalf of the insured or beneficiaries under insurance contracts. The legislature declares that it is a subject of concern that nonadmitted insurers *have issued* policies of insurance to residents of this state * * *; that this state has an interest in providing to its residents a convenient forum for the purpose of asserting and enforcing legal rights under *such policies* * * * " (R. pp. 55, 56).

The foregoing provision expressed the concern of the legislature of California that nonadmitted insurers "*have issued*" policies to California residents, and that "*such policy*" holders were without a practical forum to enforce their rights under *such policies*. Thus, the legislature, so concerned, provided for a method of substituted service upon "*such insurers*," that is nonadmitted insurers who had, at the time of the legislative action, already issued policies to California residents, and that without regard to the size of the policy or the payment plan therefor.

Moreover, the criteria set by the legislature include criteria not related to the issuance of the policy, although that act constitutes one criterion. Thus, Section 1610 of the act provides that "*any*" of the "*acts*" described in Section 1611 shall constitute an appointment of the insurance commissioner as agent upon whom process can be served. Section 1611 includes, among others, the following acts, all of which occurred in this case after the effective date of the California Act:

"1611. The acts referred to in Section 1610 are:

'(3) The collection of premiums, * * * or other considerations for such contracts.

'(4) Any other transaction of business arising out of such contract' " (R. p. 57).

Nowhere does the legislature indicate that the circumstance of untimely death, or minimal premium shall relieve the nonadmitted insurer from the operation of the act.

We turn now to the Respondent's claim that its activities in California with the deceased-insured were involuntary in that such activities were no more than a discharge of its pre-existing obligations under its reinsurance contract with Empire Mutual Insurance Company of Arizona. At the outset, the language of the Texas court in *New Amsterdam Casualty Company* v. *Patton*, 22 S.W. 2d 540, 36 S.W. 2d 1000, quoted at page 16 of our brief would appear to be a ready and adequate answer to this plea. However, it should also be pointed out that the reinsuring of insurance risks by one company with another is an ordinary and customary business practice in the insurance industry. If, in truth and in fact, this policy was an isolated California situation for the Respondent, and was a risk it did not desire to carry after the effective date of the Unauthorized Insurers' Process Act, it could readily have divested itself of this business by reinsuring the risk with some other company which was either an admitted insurer in California, or was willing to assume the risk as a nonadmitted insurer. Respondent had fourteen months to thus divest itself of this risk. Having failed to do so, its conduct can hardly be characterized as involuntary.

In closing, something should be said about the California case of *Western Travelers Accident Association of California* v. *Johnson*, 58 Pac. 2nd 206, 14 Cal. App. 2nd 306,

cited by Respondent (Respondent's brief, p. 18). In our opinion, the case is not pertinent. It dealt with the power of California to tax gross premiums collected by a California insurance company in California. The particular policies had been originally issued by a Nebraska company. But the Nebraska company had completely withdrawn from California, and had turned over all its assets and liabilities (policies) to the California company which reissued the policies to the holders. The Court, assuming a hypothetical situation, said, in the language quoted by Respondent, that the continuance of the obligation of a policy issued in a particular state, with nothing more, would not constitute doing business therein for the purpose of exacting a tax. The language quoted by Respondent is obviously dictum; but nevertheless it has no pertinence to this case which involves the kind of contacts within a state necessary to establish the basis for jurisdiction through substituted service. Whether the concepts there expressed still have application for tax cases, we need not discuss here.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court reverse and remand this case with instructions to enter judgment for the Petitioner.

Respectfully submitted,

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Proof of Service

I, HERMAN WRIGHT, an attorney in the offices of Messrs. Mandell & Wright, attorneys of record for Lulu B. McGee, Petitioner herein, depose and say that on the 4th day of October, 1957, I served a copy of the foregoing Reply Brief for Petitioner on International Life Insurance Company, Respondent herein, by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Messrs. Hornsby and Kirk, Respondent's counsel, at their address, P. O. Box 1058, Austin, Texas.

/s/ HERMAN WRIGHT

Herman Wright

SUBSCRIBED and SWORN TO BEFORE ME, the undersigned authority, on this 4th day of October, 1957.

/s/ BETTY DAVIS

Betty Davis

Notary Public in and for
Harris County, Texas

(Seal)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 50

LULU B. McGEE,
Petitioner,

vs.

INTERNATIONAL LIFE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 50

LULU B. McGEE,
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vs.

INTERNATIONAL LIFE INSURANCE COMPANY,
Respondent.

BRIEF FOR RESPONDENT

Questions Presented

The ultimate question presented is whether or not the judgment of the California court sued upon in Texas is void for want of jurisdiction in the California court. Respondent presents two questions as to the validity of such California judgment.

(1) Did respondent have such minimum contracts within California as to subject it to the juris-

diction of the California court under the California Unauthorized Insurers Process Act in view of the due process clause of the Fourteenth Amendment to the Constitution of the United States?

(2) Did the California Unauthorized Insurers Process Act, which was not passed and did not become effective until after the insurance policy sued on had been issued and delivered, confer jurisdiction on the California Court as to respondent to render the judgment sued on in view of the due process clause of the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

If petitioner by its argument has given this court the impression that this case involves a "mail order" insurance business (Petition for Writ of Certiorari p. 4; Brief for Petitioner p. 4-5), the impression is incorrect and not supported by the record.

Respondent has never engaged in the "mail order" business in California or for that matter in any other state.

The stipulations in the trial court specifically set out that neither respondent nor its predecessor has "*in any way* carried on *any business activity* within the State of California except as herein stipulated" (R. 21).

It was stipulated that neither respondent nor its predecessor had ever maintained an office of any nature whatsoever in the State of California nor

did either company have or maintain an agent or sales personnal in California nor did either of such companies actually appoint any person or officer in California as an agent of any nature for service of citation or for any other purpose nor has either of such companies or any agent or employee of either company ever been served within the State of California with summons and complaint in any court proceeding of any nature whatsoever (R. 20-21).

The only involved activities of respondent are hereinafter set out.

On September 1, 1948, respondent, a Texas corporation, entered into an agreement with the Empire Mutual Insurance Company, an Arizona benefit or assessment company, under which respondent became obligated to mail to each policy holder of the Arizona assessment company a reinsurance certificate (R. 16, 37-43).

Lowell Stepp Franklin was a member or policyholder of the Arizona assessment company and respondent in 1948 mailed from its home office in Austin, Texas, such reinsurance certificate to Franklin (R. 16-17).

The California Unauthorized Insurer's Process Act did not become effective until October 1, 1949 (R. 55).

The policy involved provided for $5,000 for accidental death and for monthly payments for loss of time by accidental means or for loss of time by sickness. The monthly premium was $1.00 (R.

21-36). The original policy provided that it shall be deemed made and liablity arises in connection therewith at Phoenix, Arizona, (R. 35). The reinsurance certificate modified the policy so that "Austin, Texas" shall be substituted for "Phoenix, Arizona" (R. 33).

Respondent mailed preimum notices from Texas to Franklin in California and Franklin mailed premiums in California to respondent in Texas (R. 17).

After the death of Franklin on December 1, 1950, proofs of death were mailed to respondent in Texas and after due consideration of such proofs, respondent refused to pay the $5,000 claimed (R. 17).

The policy expressly provided that it did not cover any loss caused by suicide while sane or insane (R. 30).

The proofs of death submitted by petitioner showed that Franklin's death was the result of suicide. Respondent offered these proofs in the trial court (R. 59-60) after having plead such facts (R. 6 (9)-10).

Petitioner filed suit against respondent in California and with service only under *Sections 1610-1620* of the *California Insurance Code* obtained judgment by default when respondent failed to file an answer in California (R. 18-20, 50-52).

Suit was filed on the California judgment in Texas and the trial court denied recovery (R.13-15). The judgment of the trial court was affirmed by the Texas Court of Civil Appeals (R. 67-68). The Supreme Court of Texas refused writ of error (R. 91).

Argument

(1) *The courts below correctly denied recovery because under the due process clause of the Fourteenth Amendment respondent did not have such minimum contracts within California as to subject it to the jurisdiction of the California court under the Califronia Unauthorized Insurers Process Act.*

As to this question, the case of *International Shoe Company vs. State of Washington, et al., (1945), 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95*, now appears to be the leading case on the subject. The facts were that the out of state corporation employed eleven to thirteen salesmen, during the four years involved, who resided in the State of Washington, whose commissions on their Washington business amounted to more than $31,000 each year, who displayed samples of shoes to prospective purchasers and on occasion rented permanent sample rooms in business buildings or hotels, the cost of such rentals being reimbursed by the out of state corporation, all resulting in a substantial volume of merchandise being regularly shipped by the out of state corporation to purchasers within the state. Service was had upon a solicitor employed by the out of state corporation in the State of Washington and also a copy of the notice of assessment was mailed by registered mail to the home office of the corporation.

This court found that the activities of the out of state corporation were neither irregular nor casual, that they were systematic and continuous through-

out the years in question and resulted in a large volume of interstate business and, therefore, the maintenance of the suit in the State of Washington did not involve an unreasonable or undue procedure.

After discussing many of the earlier opinions, this Court reached the general conclusion that:

> " . . . due process . . . requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contracts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (326 U. S. 316).

The court stated as to the due process clause:

> "That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contact, ties or relations. Cf. Pennoyer vs. Neff, supra; Minnesota Commercial Men's Ass'n. vs. Benn, 261 U. S. 140, 43 S. Ct. 293, 67 L. Ed. 573." (326 U. S. 319).

The case of *Minnesota Commercial Men's Ass'n. v. Benn (1923) 261 U. S. 140, 43 S. Ct. 293, 67 L. Ed. 573* appears reaffirmed as constitutiong "no contacts, ties or relations."

The facts in the instant case show less minimum contacts by this respondent with the State of California than were the contacts by the insurance company in the *Benn case, supra*, with the State of Montana.

In the *Benn case, supra*, the insurance company involved did a regular "mail order" business in Montana where new members were procured by advertisement and through the solicitation of old members with occasional premiums or prizes being given to the soliciting members. Proofs of loss were made on forms provided by the company; and generally in the event the attending physician's certificate was inadequate, the company procured additional information from local physicians. The premium notices were regularly mailed to the Montana policyholder and he paid dues and assessments by mail. Nothing was unusual or irregular in the proofs of death or the report of the attending physician; but without further investigation and upon unsolicited information received through the mail, the Association declined to pay.

This court concluded that the record failed to show that the out of state company was doing business in Montana within the proper meaning of those words and that the court there lacked jurisdiction to award the challenged judgment.

The activities of respondent in Califronia in this case did not even consist of the solicitation of new members or policyholders and this respondent did nothing more, and in fact less, than did the out of state company in the *Benn case, supra.* Certainly respondent's activities in California were not systematic or continuous and did not result in a large volume of interstate business as did the activities of the out of state company in the *International Shoe Company case, supra.* This record affirmatively shows that neither respondent nor its predecessor has in any way carried on any business activity

within the State of California except with the one policyholder involved in this suit who was paying a premium of $1.00 a month. This is an incredibly meager contact upon which to seek to sustain the jurisdiction claimed for the California court by petitioner.

In *Travelers Health Ass'n. et al. vs. Commonwealth of Virginia, (1950), 339 U. S. 643, 70 S. Ct. 927, 99 L. Ed. 1154*, in the opinion written by Mr. Justice Black, in which three other members of the Court joined, the *International Shoe Company case, supra*, was relied upon. It was held, where the Travelers conducted a mail order health insurance business from Omaha, having solicited Virginia members by mail and through those already members for more than forty-five years and having caused many sick benefit claims to be investigated in Virginia and having, at the time the proceedings involved were instituted, approximately 800 Virginia members, that the Association did not engage in mere isolated or short-lived transactions; that its insurance certificates, systematically and widely delivered in Virginia, following solicitations based on recommendations of Virginians, created continuing obligations between the Association and each of the many certificate holders in the state and that the proceeding against the out of state corporation was consistent with "fair play and substantial justice" and was not offensive to the due process clause.

Mr. Justice Black concurred; but in doing so stated:

> "I put to one side the case where a policyholder seeks to sue the out of state company in

> Virginia. His ability to sue is not necessarily the measure of Virginia's power to regulate, as the Court said in Old Wayne Mutual Life Insurance Company of Indianapolis, Indiana, vs. McDonough, 204 U. S. 8, 21, 27 S. Ct. 236, 40, 51 L. Ed. 345." (339 U. S. 652-2).

Mr. Justice Minton, in an opinion concurred in by three other members of the court, while expressing the view that the appeal should be dismissed, took issue with the interpretation of the "majority" opinion and expressed the view that an in personam judgment could not be based upon service by registered letter on a non-resident corporation or a natural person, neither of whom has ever been within the state (339 U.S. 658). Such opinion also stated that the minimum contacts under the *International Shoe Company case, supra*, must be "activities of the corporation's agent within the state." It was pointed out that there were such contacts by agents within the state in that case and that in addition to notice by registered letter, personal service within the state was obtained upon one of the company agents. (399 U.S. 659).

Respondent in this case has never had an agent of any kind in the State of California.

In *Perkins vs. Benguet Consolidated Mining Co., (1952) 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed 485*, this court, again following and quoting at length from the *International Shoe Company case, supra*, held that no requirement of federal due process either prohibits Ohio from opening its courts to the cause of action involved against a foreign corporation or compels Ohio to do so.

In the Perkins case the president of the foreign corporation, who was general-manager and principal stockholder of the company returned to his home in Ohio from the Philippine Islands and there maintained an office where he kept the files of the company, carried on correspondence relating to the business of the company and its employees, distributed salary checks on behalf of the company, both to himself as president and to two company secretaries, maintained two active bank accounts carrying substantial balances of company funds, held several directors meetings in Ohio, supervised policies of the company dealing with the rehabilitation of the corporation's properties in the Philippines and dispatched funds to cover purchases of machinery for such rehabilitation and thus carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company.

This court stated that:

> "The essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation. Appropriate tests for that are discussed in International Shoe Co. vs. Washington, supra, 326 U. S. at pages 317-320, 66 S. Ct. at pages 158, 160. The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case. . . ." (342 U. S. 445).

Obviously the amount and kind of activities carried on by the respondent in California are not such

so as to make it reasonable and just to subject this respondent to the jurisdiction of that state. The facts involved in the instant case are not analagous to those in any case which has been referred to by petitioner nor in any case which we have been able to find. In no such case has the jurisdiction been sustained upon a contact with only one individual whose gross business amounted to $1.00 monthly.

While the individual policyholder in a particular case sometimes may elicit sympathy, the effect of liberalizing or extending the rule permitting suits against insurers from far away states upon policyholders generally should be given serious consideration. Insurance is a business which is and should be conducted for the benefit of policyholders generally rather than for the unjust enrichment of policyholders such as the one represented by petitioner in this case. If respondent is compelled to pay an amount for which it is not liable under its contract, as it would be if the action of the lower courts be reversed, or if respondent and other insurers are compelled to defend isolated claims in distant states, the expense of doing so will lead to the ultimate disadvantage of policyholders as a whole. This general disadvantage should outweight any individual inconvenience or apparent hardship upon an individual policyholder. This reasoning has already been recognized by some courts. See *Atlas Mut. Ben. Asso. vs. Portscheller, (1945) 43 Del. 298, 46 A. 2d 643* and *Tomlinson vs. Iowa State Traveling Men's Assn., (1918) 251 Fed. 171.*

Further recognition should be given by modern day courts that most life insurance companies do not

now contest valid claims. It is not good business to do so. If this respondent had been liable upon the policy sued upon, we would not be here nor would it have been necessary for petitioner to file suit in the California court if she had a valid claim. Payment would have been made without suit.

In the instant case there can be no question about the non-liability of the insurer on the policy. It is surprising that the California court rendered the judgment sued upon even though no defense was made. The $1.00 a month policy excluded suicide as a risk assumed. The proofs of death furnished by petitioner herself showed that the insured died as a result of suicide. It was upon the basis of petitioner's own proof that liability was denied by respondent. If insurers generally are compelled to go to the expense of defending suits of the kind here involved in distant states with which they have had no more contact than did respondent with California, the effect upon policyholders generally will be a necessary increase in premiums to meet the expense of defending such suits. Such a result is neither traditionally fair nor just.

We respectfully submit that under the tests laid down by the *International Shoe case*, *supra*, and the cases following its reasoning, this respondent had no such minimum contacts as would justify subjecting it to the jurisdiction of the California court under our traditional concepts of fair play and justice. The judgments of the courts below should accordingly be affirmed.

(2) *The courts below correctly denied recovery because under the due process clause of the Fourteenth Amendment the California Unauthorized Insurers Process Act, which was not passed and did not become effective until after the insurance policy sued on had been issued and delivered, did not confer jurisdiction on the California court as to respondent to render the judgment sued on.*

The policy sued on was originally issued on April 21, 1944 (R. 16). The reisurance certificate was issued by respondent in 1948 (R. 16-17). The California Unauthorized Insurers Process Act did not become effective until October 1, 1949 (R. 55).

In *Parmalee vs. Iowa State Traveling Men's Associtation, (1953) 206 F. 2d 518, (Cert. Den. 346 U. S. 877, 74 S. Ct. 125, 98 L. Ed. 384)*, the Fifth Circuit, while upholding the validity of the Florida statute upon the ground that an unauthorized foreign insurer is put on notice by the statute of the consequences of its acts, expressly limited such holding by stating:

> "And even then, the nature and effects of the statute, and the basis for its constitutional validity, enjoin a construction no broader than necessary to effect the expressed public policy to subject unauthorized insurers who effect and continue insurance contracts delivered in Florida to Florida residents to suits in Florida which assert legal rights under such policies. Furthermore, as a regulatory law it plainly can be giver no effect which will impose, retroactively, the provisions of the statute upon unauthorized insurers having policies in force

> prior to the enactment of the statute. These distinctions are not hypothetical, but are substantial, in the proper application of the statute. They mark the line between due process and unauthorized state action." (206 F. 2d 522-3).

The same court in *Parmalee vs. Commercial Travelers Mutual Accident Association of America, (1953) 206 F. 2d 523*, held that under the Florida Unauthorized Insurers Process Act of 1949, a suit in Florida to enforce a certificate of insurance delivered by mail in the State of Kentucky in 1936 to the insured who thereafter, in 1946 or 1947, moved to Florida could not be sustained and that the order of the trial court quashing the service of process was correct.

The court gave as its reason for such decision the following:

> "Under our ruling in Parmalee v. Iowa State Traveling Men's Association, 5 Cir., 206 F. 2d 518, the certificate not being delivered in Florida to a Florida resident, subsequent to the effective date of the Florida statute referred to, the suit to enforce it does not come within the provisions of the statute." (206 F. 2d 524).

The same holding was also made in *Berg vs. Commercial Travelers Mutual Accident Association of America, (1953) 207 F. 2d 775.*

Although not relied upon or discussed by petitioner, *Schutt vs. Commercial Travelers Mutual Accident Association (1956), 229 F. 2d 158 (Cert. Den. 351 U. S. 940, 76 S. Ct. 836, 100 L. Ed. 1466)*, by the Second Circuit involved a construction of the Ten-

nessee Act of 1947. The court cited the *International Shoe case, supra,* for the proposition that state statutes which provide for substituted service against non-residents and foreign corporations will support judgments in personam provided there exist "certain minimum contacts" within the territory of the forum of such a character "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

The court found that:

> "The activities of defendant in Tennessee were: the usual solicitation of new business by 'members', with prizes, advertising matter and application blanks; notices of assessments or premiums due, sent regularly through the mail to decedent and to other policyholders and received by him and by others at their Tennessee homes; acceptance of remittances for assessments or premiums mailed in Tennessee; and the mailing of proofs of loss in Tennessee and the presence of an investigator of defendant on the premises after the fire." (299 F. 2d 160).

The Second Circuit stated that an interpretation which excluded from the operation of the Tennessee statute policyholders who had received their policies prior to the effective date of the statute would seem to have no relationship to the purposes for which the legislation was passed.

While so construing the Tennessee Act, the Second Circuit does not appear to have considered that such a construction directly involved due process as to whether such act can be given effect when it imposes retroactively the provisions of the statute upon

unauthorized insurers having policies in force prior to the enactment of the statute. It apparently was not recognized, as held by the Fifth Circuit, that the distinction is substantial and marks the line between due process and unauthorized state action for the Second Circuit, after discussing its construction of the Tennessee statute states:

> "The constitutional question is more difficult of solution." (229 F. 2d 161).

Under its discussion of the constitutional question, the Second Circuit does not mention the due process distinction made by the Fifth Circuit as to the invalidity of a retroactive effect of such a statute but proceeds to discuss the rule laid down in the *International Shoe Company case, supra,* and other cases following it, as to the constitutional minimum contacts. The court points out that the defendant in the *Schutt case, supra,* had hit upon a way of transacting its business which reduced its contacts with its policyholders and its method of obtaining new business to communications by mail; but that the result was precisely what it would have been if salesmen rather than "members" procured new customers and if agents went from house to house collecting premiums instead of sending notices and receiving remittances through the mail. It was stated that this was done year after year on a large scale in a systematic and regular way and that doubtless large numbers of policies were issued in due course to residents of Tennessee each year and these were administered and processed in due course in addition to those already held by others.

It would seem, therefore, that the reasoning of the Second Circuit in resolving the "difficult" constitutional question was upon the basis that the defendant in that case was generally engaged in the mail order business in Tennessee, rather than upon the retroactive effect of the statute which was not discussed under the "constitutional question", because the court expressly states in reversing and remanding the case that if there is any doubt about *the extent* of defendant's mail order insurance business in Tennessee, plaintiffs should be afforded an opportunity to amplify the proofs appearing in their affidavits. (229 F .2d 162).

In any event, the *Schutt case, supra*, definitely recognizes the necessity for the minimum contacts required by the *International Shoe Company case, supra*. Respondent did not have such minimum contacts with California.

If there be a real conflict as to the constitutional question between the *Schutt case, supra*, and the *Parmalee* and *Berg cases, supra*, then we submit that the holdings of the *Parmalee* and *Berg cases, supra*, as to the invalidity of the retroactive effect of such an act are more reasonable and just.

When a foreign unauthorized insurer deliberately institutes a general mail order insurance business in a state which has already adopted an Unauthorized Insurers Process Act, the subjecting of such an insurer to suits within such state may be understandable. The foreign insurer can know that he does a mail order business at the risk of being sued in the state in which policies are solicited after the passage of such an act.

This is not the situation in the instant case. Here

respondent in compliance with its written contract with the Arizona corporation was obligated to issue its reinsurance certificate to the California policyholder and to thereby continue the life policy which the Arizona corporation had issued. It did so before the California Act was passed. The sending of premium notices thereafter was merely a customary convenience to the policyholder.

The State of California by thereafter enacting its Unauthorized Insurers Process Act should not be permitted to destroy the contract involved or to make its mere continuance, independent of acts within the limits of California, a privilege to be granted or withheld. Neither the continuance of the policy contract nor acts done elsewhere on account of it should be regarded as being within the state's control. Even the California courts have so held.

In *Western Travelers Accident Association of California vs. Johnson, (1936) 58 P. 2d 206, 209,* the court was construing the reinsurance by a California corporation of policies originally issued in Nebraska in connection with the California premium tax provision in its Constitution. The court stated:

> ". . . The continuance of the contracts of insurance, whether written in Nebraska or California, was not dependent upon the consent of the State of Nebraska. It is the actual transaction of business that furnishes the ground of license exaction, and not the mere existence of the obligation under the policies previously written. These policies are contracts already made; the State of Nebraska 'cannot destroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continu-

> ance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the State's control.' Providence Sav. L. Assur. Society vs. Kentucky, supra."

Under the undisputed facts in the instant case, traditional notions of fair play and justice require the holding that the California Unauthorized Inthe holding that the California Unauthorized Insursurer's Process Act, since it was not passed until after the policy sued on had been issued and delivered, was not sufficient to confer jurisdiction on the California court as to this respondent to render the judgment sued on.

Conclusion

The rule of this court requiring certain minimum contacts within the state before a foreign corporation may be subjected constitutionally to suit in such state is sound and fair. Since no such contacts exist in this case, such rule should be controlling. Also, it would be unjust to apply retroactively the California Unauthorized Insurers Process Act to this respondent.

For either or both of the reasons stated, the judgments of the courts below should be affirmed.

Respectfully submitted,

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Proof of Service

I, Stanley Hornsby, one of the attorneys for International Life Insurance Company, respondent herein, and a member of the Bar of the Sureme Court of the United States, hereby certify that on the 9th day of August, 1957, I served a copy of the foregoing Brief for Respondent on Lulu B. McGee, petitioner herein, by mailing a copy thereof in duly addressed envelope with air mail postage prepaid to Mandell and Wright, petitioner's counsel, at their office in the South Coast Building, Main at Rusk Street, Houston 2, Texas.

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